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IN THE

Supreme Court of the United States

October Term, 1943

No. [redacted] 7

LYNCH CORPORATION, THOMAS CHANDLER WERBE, E. G. BRIDGES, A. G. DOLL, J. L. WATTS, UZ McMURTRIE AND N. M. McCULLOUGH,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court of the United States for the Northern District of Ohio, Western Division

BRIEF ON BEHALF OF LYNCH CORPORATION, THOMAS CHANDLER WERBE, E. G. BRIDGES, A. G. DOLL, J. L. WATTS, UZ McMURTRIE AND N. M. McCULLOUGH

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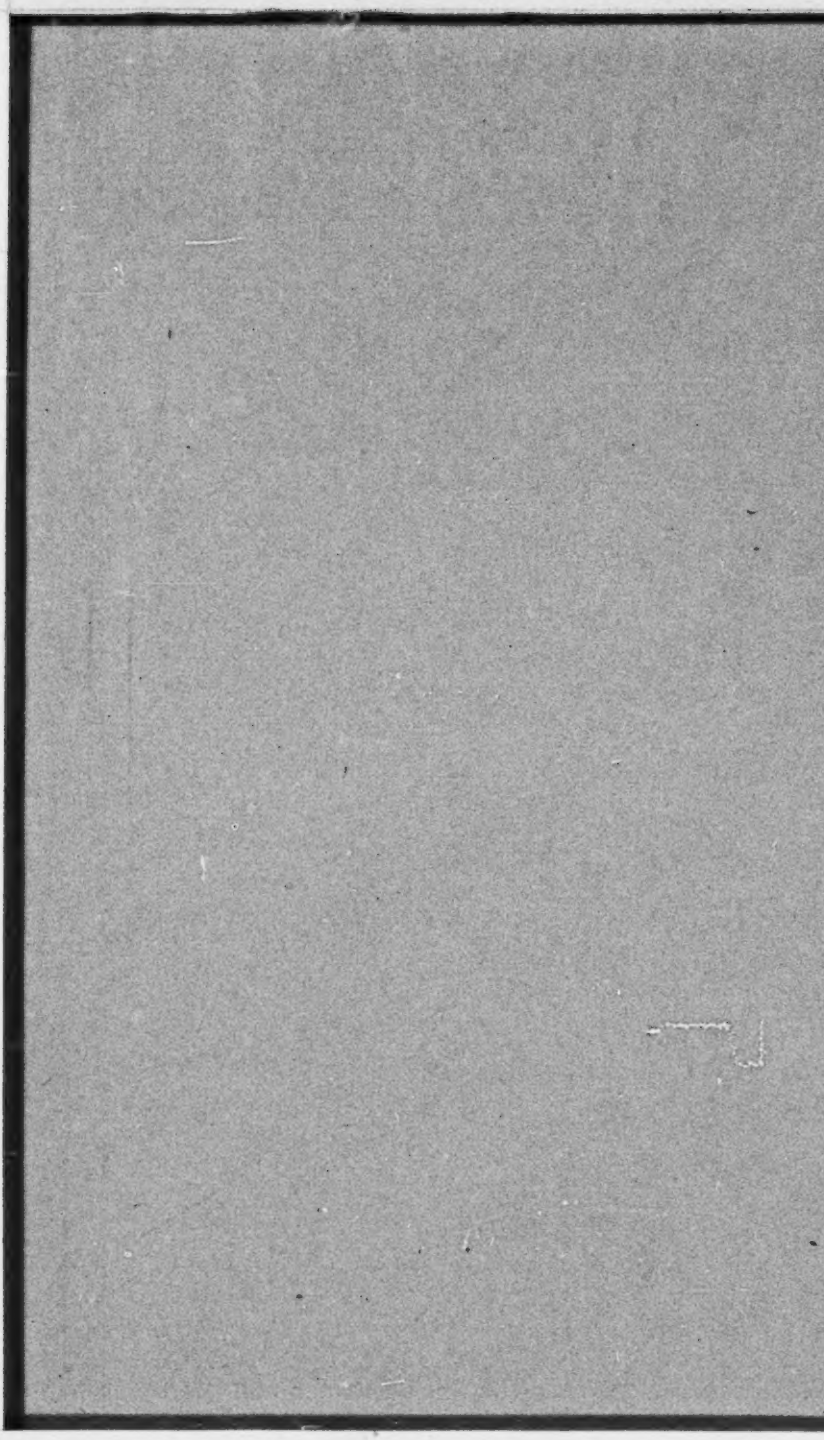

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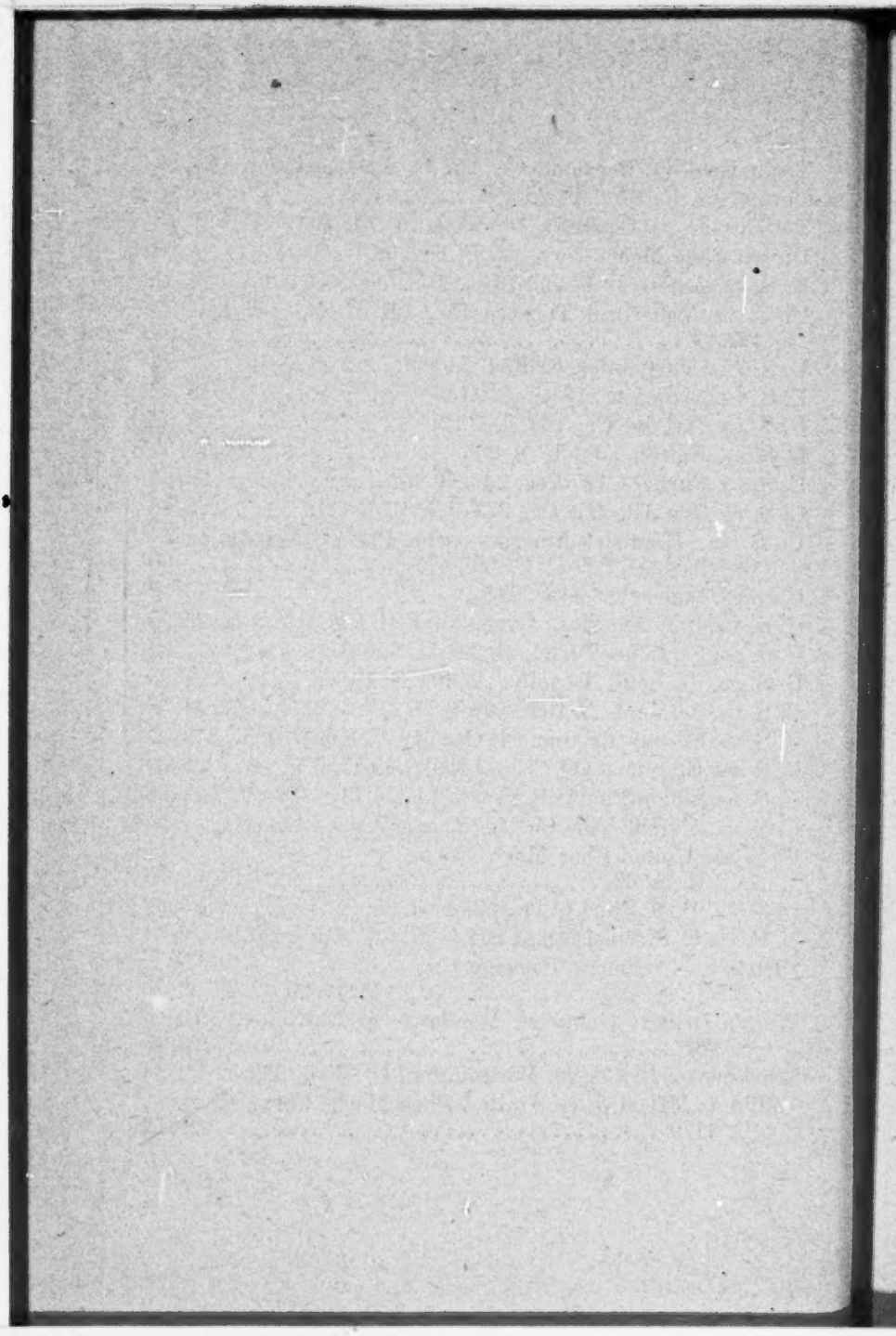

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The opinion of the United States District Court is reported in 46 Fed. Supp. 541.

GROUNDS OF JURISDICTION

The action below was instituted under Section 4 of the Sherman Anti-trust Act and under Section 15 of the Clayton Act against the defendants therein named to prevent violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. Jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this case, is conferred by Section 2 of the expediting Act of February 11, 1903, as amended (15 U. S. Code, Section 29) and Section 238 of the Judicial Code, as amended (28 U. S. Code, Section 345).

STATEMENT OF THE CASE

This is an appeal from a final judgment enjoining Lynch Corporation, its associated individual defendants and other corporate and individual defendants generally from continuing to violate Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act and particularly from engaging in a number of acts and transactions which neither the evidence nor findings disclose that Lynch Corporation had ever previously engaged in, set forth in detail in the Judgment and in Assignments of Error Nos. 18 to 37;[1] cancelling the Lynch Corporation-Hartford-Empire Company cross-licensing agreement of September 18, 1940; and requiring Lynch Corporation to offer for sale within two years after the war certain assets acquired by it in 1933 from Mr. Ed Miller of Columbus, Ohio.

The Issues. The defendants in this case are charged generally with conspiring and establishing a monopoly of patents relating to glassmaking machinery and of the manufacture and distribution of such machinery through patent control by limited leases and licenses through which, it is claimed, that there is undue restraint of trade in such machinery and indirectly, in glassware. The conspiracy is alleged to have been initiated in 1916 by means of the Hartford-Fairmont--Empire Machine Company agreement of June 30, 1916, followed by the so-called "formation agreement of October 6, 1922" and the Hartford-Empire Company-Owens Illinois Glass Company agreement of April 9, 1924. The allegations of the complaint, as well as the evidence, relat principally to patents and licenses thereunder with reference to feeders and the charges with respect to forming machines relate exclusively to patents and are incidental to the principal conspiracy alleged.

Lynch Corporation and its associated individual de-

[1]R. 7859-65.

fendants are not charged with any connection with the alleged conspiracy prior to August 23, 1933. With respect to Lynch it is charged that by reason of two transactions, Hartford-Empire Company, Owens-Illinois Glass Company and Lynch Corporation achieved a virtual monopoly and dominating position with respect to patents covering glass forming machinery and the manufacture and distribution of such machinery.[2] The two means of assisting to create the alleged monopoly of patents covering forming machines set forth in the bill of complaint against Lynch Corporation are:

1. That on August 23, 1933, Lynch Corporation was induced to join the conspiracy by Hartford-Empire Company and Owens-Illinois Glass Company by entering into a cross-licensing agreement with Hartford-Empire Company regarding their respective forming machine patents, the purpose and effect of which was to compel a purchaser of a Lynch Corporation forming machine to use it with a Hartford-Empire Company feeder[3] thus charging violation of the Clayton Act.

2. That with funds supplied by Owens-Illinois Glass Company and Hartford-Empire Company, Lynch Corporation purchased the patent rights of their remaining competitors in the production of forming machines,—O'Neill Suction Machine Company and Ed Miller Machine and Mold Company—and transferred certain of said patents to Hartford-Empire Company and certain to Owens-Illinois Glass Company.[4]

It is also charged in the Bill of Complaint, Par. 116,[5] that although the 1933 agreement between Hartford-Empire Company and Lynch Corporation was not specific as to Lynch Corporation's right to sell forming machines to glass

[2]Bill of Complaint 111-121, R. 34-36.
[3]Pars. 111-118, Bill of Complaint, R. 34-36.
[4]Par. 119-120-121, Bill of Complaint, R. 36.
[5]R. 35.

manufacturers that did not have a feeder license from Hartford-Empire Company, thereafter, pursuant to an understanding between Hartford-Empire Company and Lynch Corporation, Lynch Corporation refused to sell forming machines to persons not having a feeder license from Hartford-Empire Company.

These charges were specifically denied in the answer of Lynch Corporation, and we call attention particularly to paragraphs in the answer of Lynch Corporation numbers 28, 35, 36 and 38[6] wherein briefly Lynch Corporation averred that it purchased the business and most of the assets of the Ed Miller Machine and Mold Company in 1933 including certain patent rights relating to feeders and that Lynch Corporation thereafter granted Hartford-Empire Company a license under the patent rights so acquired; in addition Lynch Corporation averred that the Ed Miller Machine and Mold Company was not a competitor of it; Lynch Corporation also averred in the answer that the patent controversy extending over a period from 1927 to 1933 was with the Whitall-Tatum Company, owners of the Headley and Thompson applications and not with the Hartford-Empire Company; that there never was such an understanding as charged in the preceding paragraph hereof and that under the terms of the 1933 agreement with Hartford-Empire Company it sold narrow-neck forming machines to anyone that had secured a license from Hartford-Empire Company under Hartford-Empire Company forming machine inventions.

FINDINGS AND JUDGMENT

The injunction was entered following the rendering of the opinion of the lower court in which he concluded (1) that the purchase of the wide-mouth forming machine business of Ed Miller Machine and Mold Company by Lynch

[6]R. 229-32.

Corporation, together with the acquisitions of other patents and properties by Hartford-Empire Company and Owens-Illinois Glass Company substantially put an end to all competition in the glass forming machine business[7] and (2) that the cross-licensing agreement relating to forming machines dated August 23, 1933, between Hartford-Empire Company and Lynch Corporation and the conduct of the parties thereafter, in living up to the terms of such agreement, were in violation of Section 3 of the Clayton Act as well as part of a general conspiracy in violation of the Sherman Act.[8] In its judgment the court generally concluded that Lynch Corporation, with other defendants, violated Sections 1 and 2 of the Sherman Act,[9] but in its findings of fact the court found that Lynch Corporation, with the financial assistance of Owens-Illinois Glass Company, Hartford-Empire Company, William E. Levis and Harry E. Collin purchased the assets of Ed Miller[10] and that the Lynch Corporation-Hartford-Empire Company Forming Machine agreement had the purpose and effect of giving Hartford-Empire Company complete control over the distribution and use of all narrow-neck machines and of substantially all efficient fully automatic wide-mouth forming machines.[11] The latter phrase is in direct conflict with the Opinion wherein the court states: "In view of the fact that Headley & Thompson, now controlled by Hartford, was claimed to have dominated the Lynch Forming Machines, the result of the agreement was that Lynch could sell no narrow neck forming machines except to persons who had first obtained a forming machine license from Hartford. The Ed Miller acquisition placed in the hands of Lynch wide-mouth forming machines and

[7]Opinion 61.
[8]Opinion 72.
[9]R. 7657-8.
[10]Finding No. 328, R. 7347.
[11]Finding 341, R. 7350.

these apparently did not come within this requirement."[12] "The only possible forming machine that Lynch could make and sell without the necessity of the Hartford Forming machine license was the wide-mouth forming machine that it acquired the right to manufacture through the purchase of the Ed Miller Company."[13]

Conclusion of Law No. 64 states that the acquisition by Lynch Corporation of the business of Ed Miller with the aid of Hartford-Empire Company and Owens-Illinois Glass Company and in pursuance of a plan by all parties to corner the forming machine market was illegal under Sections 1 and 2 of the Sherman Act.[14]

The above findings and conclusions are in complete variance with the pleadings and beyond the scope of the issues. The issue was whether Lynch Corporation, with funds supplied by Owens-Illinois Glass Company and Hartford-Empire Company, purchased patent rights of their remaining competitors which, combined with the Hartford-Empire Company-Lynch Corporation cross-licensing agreement, permitted Hartford-Empire Company, Owens-Illinois Glass Company and Lynch Corporation to achieve a virtual monopoly and dominating position with respect to patents covering forming machines. The court concluded that Hartford-Empire Company, Lynch Corporation, Ed Miller Machine and Mold Company and Owens-Illinois Glass Company combined for the purpose of getting the licensing of forming machines into Hartford-Empire Company's single hand and thereby strengthened Hartford-Empire Company's monopoly of feeders.[15] There is no finding, nor does the evidence disclose, that Lynch Corporation had any connection whatsoever with the acquisition by Owens-Illinois

[12]Opinion 13.
[13]Opinion 71.
[14]R. 7415.
[15]Conclusion 27-28, R. 7407-8.

Glass Company and Hartford-Empire Company of the assets, including patents, of the O'Neill Suction Machine Company.

The court made no specific finding of fact that Lynch Corporation joined the alleged conspiracy.[16]

It is the position of these appellants on this appeal:

1. That at the close of plaintiff's case, when these appellants moved to be dismissed, there was no evidence from which the lower court might justly infer that Lynch Corporation ever joined any conspiracy or in any other manner violated any provision of the Sherman or Clayton Acts.

2. That the purchase of the assets of Ed Miller Machine and Mold Company, which was not a competitor of Lynch Corporation, was a legitimate expansion of Lynch Corporation's machinery business into an allied field when there was serious danger that Lynch Corporation would be forced to discontinue its narrow-neck forming machine business.

3. That after a period of five years of patent litigation at a cost of $[illegible],000 Lynch entered into the cross-licensing agreement of August 23, 1933, under which Lynch Corporation became a mere licensee of Hartford-Empire Company under the dominant Headley and Thompson and other Hartford-Empire Company patents and under which agreement, competition between Hartford-Empire Company and Lynch Corporation, who had theretofore been the principal producers of narrow-neck forming machines, continued unabated and more vigorous than prior to said agreement.

4. That no illegal restraint of trade in forming machines, nor in glassware, was effected by Lynch Corporation through its purchase of the business of Ed Miller Machine and Mold Company or by its acceptance of a forming ma-

[16]Cf. Findings of Fact 313-347, R. 7345-51.

chine license which permitted Lynch Corporation to use Hartford-Empire Company's inventions.

5. The issue relating to the acquisition of Ed Miller Machine & Mold Company was limited to patents and did not include other assets.

6. Finally, appellants contend that there is no justification for the inclusion of Lynch Corporation in the sweeping and drastic provisions of the injunction such as the cancellation of its present unlimited cross-licensing agreement of 1940, the sale of assets acquired from Ed Miller Machine & Mold Company, and many other sections of the injunction restraining Lynch Corporation from engaging in normal and legitimate business practices in the absence of any evidence or findings to support such drastic relief. The drastic decree is founded upon assumptions unwarranted and contradicted by the record and is unnecessary to prevent recurrence of conduct alleged but not proven to be unlawful.

We, therefore, direct the court's attention to the following statement of the facts in the case which are clearly supported by the record.

FACTS

There is no dispute as to the facts in this case nor should there be any as to the reasonable inferences to be drawn therefrom. We will sometimes refer to Lynch Corporation as Lynch, Hartford-Empire Company as Hartford, Owens-Illinois Glass Company as Owens and Ed Miller Machine and Mold Company as Miller.

Lynch has never manufactured glassware. Its activity, in the glass business, has always been confined to the manufacture and sale of forming machines of the gob-fed type. Prior to its acquisition of Miller in 1933, its machines were designed for and used primarily in the production of narrow-neck ware. Since such acquisition it has continued the

manufacture and sale of the Lynch narrow-neck formers (blow and blow) and has also continued the manufacture and sale of the Miller wide-mouth formers (presses—and press and blow). It has never built nor sold a suction machine. Photographs of machines of several types appear in Ex. H-5361[17] and descriptions are found in the testimony of Mr. Lorenz.[18]

The Lynch business was started in 1917 and by 1927 Lynch narrow-neck forming machines had become the standard forming machines in the industry and 70% of the narrow-neck forming machines then in use were Lynch machines.[19]

In the gob-fed process a forming machine or "former" is required to form the glass which is fed to it by the feeder. Hartford's early development was largely centered on feeders. However, as early as 1912 Hartford had built a continuously revolving press[20] and has ever since continued the development of forming machines,—primarily narrow-neck. In 1922 Hartford began the development of its "I-S" machine and placed it in commercial operation in 1925.[21]

Hartford machines (which it had manufactured for it) were all leased to its customers, whereas Lynch has always sold its machines outright. By the early part of 1933 substantially all narrow-neck machines were supplied by either Hartford or Lynch. The entire market for such machines was very limited, perhaps 80 to 100 machines a year, and the competition between the two was keen. Competition between the two has continued and is now even keener than then,[22] but now, as then, the two companies furnish prac-

[17]R. 15061.
[18]R. 5638-91.
[19]Complaint, Par. 112, R. 34; Lynch Answer, Par. 32, R. 230.
[20]R. 4321-24.
[21]R. 5670.
[22]R. 2849, 5807-8, 5812.

tically all of the narrow-neck machines in use. Significant of this competition was a substantial reduction in license fees by Hartford on its I-S machines in 1937.[33]

There are other narrow-neck forming machines in use, principally those made by some of the glass manufacturers themselves, such as Hazel, Ball and Owens. For illustration, Hazel uses 56 of its own make (Hazel), 13 Hartford "I-S" and 218 Lynch machines.[34]

Thus, from 1927 up to the present time, Hartford and Lynch have been the principal producers of narrow-neck forming machines and competition in the marketing thereof from other manufacturers throughout that period has been very slight.

It must be kept in mind that the above statements refer to the machines using the gob-fed process. In 1933, as now, about 30% of the glass containers produced in the United States was made on suction machines, principally Owens suction machines. This glassware was, and is sold, in competition with that made by the gob-fed process. In the suction machine process the molten glass is sucked from the furnace, or some extension thereof, directly into the mold of the forming machine, where it is formed into the desired shape, and no feeder or feeding device is used. Patents relating to the principal Owens suction machines expired prior to 1931.[35]

In 1927 Lynch Corporation discovered the applications for patents of Headley and Thompson, who were employees of Whitall-Tatum Company, engaged in the manufacture of glassware, not a defendant herein. The claims in these applications (filed in 1914) were basic and covered the essential operations of the Lynch machine. Certain applications of Lynch were thrown into interference with the

[33] R. 5807-8, 5812, 7928-B.
[34] R. 5615-6.
[35] R. 4763, 6657-63.

Headley and Thompson applications. This interference was most vigorously contested by the parties from 1927 to 1933 at a cost to Lynch of about $250,000.[26] Lynch exerted every effort to overcome the Headley and Thompson claims and sought assistance from every known source.[27]

Although in 1932 a decision favorable to Lynch was rendered by the Examiner in the Patent Office,[28] as the litigation progressed, patent counsel of Lynch some time prior to the adverse decision of the Board of Patent Appeals, advised a settlement of the interference because of the probability that at least some of the basic claims of Headley and Thompson would be allowed.[29] This would have prevented Lynch from marketing its machines and would have subjected all of its customers to damages for infringement.

In June, 1933, the Board of Patent Appeals reversed the Examiner and allowed substantially all of the basic claims of Headley and Thompson[30] relating to forming machines.[31]

For some years prior to 1933 the president of Lynch Corporation had considered the possibility of engaging in the manufacture of wide-mouth machines because it would lend some diversification to Lynch's business[32] but the matter did not receive serious consideration until the spring of 1933 when Lynch was confronted with the possibility of having to discontinue its narrow-neck machine business on account of the Headley and Thompson applications. At

[26]Par. 113, Bill of Complaint, R. 35; Lynch Answer, Par. 33, R. 230.
[27]R. 2702, 2763-5.
[28]R. 2755.
[29]R. 2743.
[30]R. 2755, 2841.
[31]See Opinion p. 12, 71; Findings of Fact No. 286, 288, 296 and 317, R. 7339-46.
[32]R. 2743, 2752.

this time the president of Lynch Corporation learned from the defendant McMurtrie, who theretofore had had no connection with Lynch Corporation, that the Miller business could be purchased for one-half million dollars.[33] At this time Ed Miller Machine and Mold Company was making presses and press-and-blow machines. Ed Miller had indicated in 1932 his desire to sell his business[34] and later authorized agents to find a purchaser. The Miller business was not a competitor of Lynch[35] and did not serve the same market as narrow-neck machines.[36] Lynch, however, was not in a position at this time to finance the purchase except by a public offering of stock, which was not only difficult and expensive but of doubtful success on account of the general business depression.[37]

Lynch officers agreed to purchase the Miller business on May 12, 1933, when W. E. Levis and H. E. Collin agreed to underwrite the sale of sufficient Lynch stock to finance such purchase. Mr. Collin held the option to purchase Miller's business. The purchase was consummated on August 21, 1933. Funds were raised as follows:

1. Sale of 10,000 shares of Lynch Corporation stock to Messrs. Levis and Collin at $20.00 per share.

2. Sale of exclusive rights of Lynch's suction machine inventions to Owens for $125,000.

3. Sale of exclusive rights of Lynch's feeder inventions to Hartford for $125,000.

By this purchase, Lynch acquired no patent rights from Miller relating to the suction process and, therefore, did not transfer any such rights to Owens or Hartford as alleged in the Bill of Complaint and as erroneously stated

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[33] R. 2751.
[34] R. 2178.
[35] R. 2709.
[36] R. 1465.
[37] R. 2747-8.

by the court.[38] Incident to the purchase of the Miller assets, Lynch acquired four patents, only one of which related to feeders—Patent No. 1,497,929.[39] Lynch did not transfer this patent to Hartford or Owens but under the Lynch-Hartford feeder licensing agreement[40] Lynch granted Hartford an exclusive right under Lynch's feeder inventions, which grant included rights to this feeder patent Lynch acquired from Miller.

Hartford and Owens had acquired an option for a license under the Headley and Thompson applications in 1925[41] and in 1933, prior to the adverse Patent Office decision against Lynch, obtained an option to purchase these applications. In addition to the Headley and Thompson interferences Lynch had patents containing claims which it asserted were infringed by Hartford machines. Hartford in turn had other patents which it claimed were infringed by Lynch machines. Prior to 1933 notices of interference had been interchanged between Hartford and Lynch[42] and conferences had been held between representatives of the two companies to discuss the claims without reaching any settlement.[43] Lynch patents covered what is known as the Lynch transfer apparatus.[44] Hartford patents covered what is known as the overlapping cycle.[45] The claims allowed in the Headley and Thompson applications were of such a nature that they could not be circumvented by Lynch engineers.[46] After the adverse decision in the

[38]Opinion p. 13.
[39]Ex. 963, R. 9281.
[40]Ex. 329, R. 9065-67.
[41]Ex. 302, R. 9015-31.
[42]R. 2704; Ex. 1001, R. 13662C; Ex. 1003, R. 13664; Ex. 1004, R. 13665.
[43]R. 2706-25; Ex. 1001-1019, R. 13662C to 13673.
[44]R. 5664-67, 5687-8; Ex. 1001, R. 13662C.
[45]Ex. 6068, R. 5671-75, 5681, 5689-91, 8795, 8811-2, Ex. 5103, R. 9966-10031, Ex. H5105, R. 10050-85, Exs. H5950, H5951, R. 15654-16004, Ex. H6052, R. 16171-2.
[46]R. 2743.

Patent Office on June 15, 1933, Lynch was forced to negotiate a settlement of the Headley and Thompson interferences and other controversies with Hartford not only to permit Lynch to continue its business[47] but also to protect its many customers from infringement suits to whom it had sold many forming machines.[48]

After the June 15, 1933, decision of the Patent Office, Hartford, through its option from Whitall-Tatum Company, assignees of Headley and Thompson, had secured patent rights which completely and basically dominated the narrow-neck forming machine field.[49] Lynch's engineers as well as its patent counsel were convinced that Lynch could not design Lynch machines so as to operate without infringing Headley and Thompson.[50]

Lynch still retained its position in the industry as the producer of the most efficient, standard forming machines, the good will of its customers, and the fact, well known to the opposition, that Lynch might continue the litigation for a number of years and thus continue the unsettled patent situation in which the forming machine business had been for a number of years.[51] While retaining this position, Lynch entered into negotiations with Hartford culminating in the cross-licensing forming machine agreement of August 23, 1933.[52]

Under this agreement Hartford granted Lynch a non-exclusive license to make and deliver forming machines embodying Hartford's licensed forming machine inventions (including the Headley and Thompson inventions) to any person or company that obtained from Hartford a license under Hartford's forming machine inventions to use such

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[47]R. 2763-67.
[48]R. 2879.
[49]See Findings of Fact No. 286, 288 and 293, R. 7339-41.
[50]R. 2743.
[51]Ex. 312, R. 12870; Ex. 325, R. 12902; Ex. H-6052, R. 16171-2.
[52]Ex. 330, R. 9067-75.

machines. Lynch, in turn, granted Hartford a non-exclusive license to make and distribute forming machines embodying Lynch inventions. The agreement lists 220 Hartford patents, 35 Hartford applications for patents, 10 Lynch patents and 11 Lynch applications for patents on forming machines.[53] Hartford was required to extend its feeder licenses so as to permit its feeder licensees to use such forming machines without the payment of any additional royalty. No restraint was placed upon either party with respect to the licensing or use of its own patents.

In 1933 Hartford's forming machine business was much smaller than Lynch's. Nevertheless the market for forming machines was quite limited because it comprised only glass-container manufacturers. If, notwithstanding the forming machine agreement, Hartford for one reason or another should fail to issue licenses to use Lynch machines, Lynch would have been placed at a serious disadvantage. Section 8 of the agreement, therefore, provided that Hartford should pay Lynch a royalty with respect to each patented forming machine delivered by Hartford in any year in excess of 40% of the aggregate production capacity of patented forming machines delivered by both Hartford and Lynch during such year. However, no such royalty was ever paid by Hartford to Lynch, and in the fall of 1938, when the possibility arose that Hartford might sell in excess of 40% of the machines, Lynch agreed to the cancellation of Section 8 of the agreement in exchange for Hartford's agreement to permit Lynch to sell wide-mouth (Miller) machines embodying Hartford patents without requiring the purchasers thereof to secure a license to use such machines.[54]

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[53]Ex. 330, Schedules A and B, R. 9075-82.

[54]Patents granted to Hartford in 1930 to 1932 cover the drive and safety features in the Miller Machines. R. 5643-5, Ex. H-5680, R. 12028; Ex. 5103, R. 9966-10031; Exs. 1060, 1060A, R. 13707-10.

On September 18, 1940, Hartford and Lynch cancelled the 1933 contract and entered into a new agreement pursuant to which Lynch offers to sell all models of its machines without requiring purchasers thereof to secure any license from Hartford to use such machines, and has actually sold machines to companies which were neither feeder nor forming machine licensees of Hartford.[55]

No plan or suggestion was carried out other than the written agreements hereinbefore referred to.[56] The position of Lynch Corporation is that no proper inferences can be drawn from the above facts which will support any of the charges in the Bill of Complaint against Lynch. The court repeatedly stated that it is not necessary to resort to inferences in this case.[57] At the request of the court[58] these appellants submitted findings of fact incorporating substantially the foregoing matters set forth in the above Statement of the Case[59] which the court ignored and entered verbatim findings and conclusions relating to Lynch Corporation submitted by plaintiff.[60]

SPECIFICATIONS OF ERRORS TO BE URGED

Appellants urge, in this court, that the court below erred in overruling the motion of these appellants to dismiss them offered at the conclusion of plaintiff's case;[61] in inferring (but not finding), and adjudging that these defendants

[55]R. 2848.
[56]R. 2852-3.
[57]Opinion 51.
[58]R. 6854-5.
[59]R. 7212-28, Assignments 2, 2½, 3; R. 7849-54.
[60]Cf. Findings of the Court 281-350, R. 7339-52; Findings proposed by plaintiff 281-345a, R. 6989-7003; Conclusions of Court 1, 4, 21, 27, 28, 47, 63-66, 68, 82, 83, 86, 89, R. 7400-20; Conclusions proposed by plaintiff 1-4, 17, 27, 28, 48, 66-68, 69a, R. 7071-91.
[61]Assignment 10, R. 7858.

joined the conspiracy alleged in the Bill of Complaint;[62] in admitting and considering evidence beyond the scope of the issues made by the pleadings with reference to these appellants;[63] in concluding that the purchase by Lynch of the assets of Ed Miller was illegal;[64] in concluding and adjudging that the cross-licensing agreements between Hartford and Lynch and compliance with the terms thereof by Lynch were illegal;[65] in enjoining these appellants from violating Section 3 of the Clayton Act;[66] in rejecting all of the findings of fact and conclusions of law submitted by these appellants at the court's request, and in entering verbatim biased, prejudicial and unsupported findings and conclusions relating to these appellants, submitted by plaintiff;[67] in failing to find that there existed between Hartford and Lynch legitimately conflicting patent interferences, that the interchange of patent rights between said corporations was necessary if technical advancement of glass-forming machines was not to be blocked by continued litigation, that the cross-licensing agreements freed both corporations to employ their respective inventions in free and open competition with each other, and that such agreements promoted competition;[68] in failing to find and conclude that the issues with respect to these appellants have become moot;[69] in including these appellants in numerous sections of the final judgment in disregard of the nature of Lynch's business as contrasted to that of other defendants and in complete disregard to the failure of the evidence to disclose that these appellants had ever engaged in any of the practices enume-

[62] Assignments 1, 11, R. 7849, 7858.
[63] Assignment No. 12, R. 7858.
[64] Assignments 17, 35, R. 7859, 7864.
[65] Assignments 1, 2, 2½, 13, R. 7849-52, 7858.
[66] Assignments 1, 14, 29, R. 7849, 7859, 7862.
[67] Assignment 7, R. 7858.
[68] Assignments 2, 2½, R. 7849-52.
[69] Assignments 3, 4, 5n, 38, R. 7852-4, 7857, 7865.

rated and enjoined in the several injunctive provisions of said judgment;[70] in granting relief in excess of that contemplated or permitted by the Sherman Act, the Clayton Act, by law or in equity.[71]

SUMMARY OF ARGUMENT

The motion to dismiss Lynch Corporation and its associated individual defendants made at the conclusion of plaintiff's case should have been granted. The appellate court may review the error of the trial court in overruling this motion. There was no finding or competent proof that Lynch joined the alleged conspiracy.

U. S. vs. American Linseed Co., 275 Fed. 939, 941;
Lucadomo vs. U. S., 280 F. 653, 657;
Marrash vs. U. S., 168 Fed. 225;
Turcott vs. U. S., 21 F. 2d 829;
U. S. vs. Lancaster, 44 F. 896;
Thomas vs. U. S., 57 Fed. 2d 1039, 1042;
U. S. vs. Falcone, 311 U. S. 205;
Virtue vs. Creamery Package Co., 227 U. S. 8;
U. S. vs. Crimmins, 123 Fed. 2d 271;
Mayola vs. U. S., 71 Fed. 2d 65, 67;
Interstate Circuit, Inc., vs. U. S., 306 U. S. 208, 226;
Frey & Son vs. Packing Co., 256 U. S. 208.

There was no "definite factual showing of illegality" regarding Lynch Corporation.

Standard Oil Co. vs. U. S., 283 U. S. 163, 179;
Terminal Warehouse vs. Penn. Co., 297 U. S. 500, 516.

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[70]Assignments 18, 22-33, 36, 37, 44, R. 7859-60, 7864-5, 7867.
[71]Assignments 34, 35, 37, 39-44, R. 7863-8.

Declarations of other defendants were improperly admitted and considered against Lynch in the absence of proof *aliundi* that Lynch was a party to the conspiracy.

Glasser vs. U. S., 62 S. C. 457, 467;
Minner vs. U. S., 57 Fed. 2d 506;
Nudd vs. Burroughs, 91 U. S. 426.

Hartford and Lynch had a legal right to compose their conflicting patent claims and no improper inference can be drawn from such action.

Standard Oil Co. vs. U. S., 283 U. S. 163;
U. S. vs. United Shoe Co., 247 U. S. 32, 52;
International Shoe Co. vs. Commission, 280 U. S. 291, 301.

No conspiracy to restrain trade may be inferred in this case as it has in cases where actual restraint resulted after execution of contracts. No price-fixing agreement is charged against Lynch.

Apex Hosiery Co. vs. Leader, 310 U. S. 496, 500;
Virtue vs. Creamery Package Co., 227 U. S. 8, 33;
U. S. vs. Socony Vacuum Oil Co., 310 U. S. 150, 225.

Lynch's principal object in buying the Miller business was to enter an allied line as a protection to its future in case it could not continue its narrow-neck machine business. Lynch's purpose and intent in accepting a non-exclusive license from Hartford was to settle expensive patent litigation and to continue in the forming machine business.

Standard Oil Co. vs. U. S., 283 U. S. 163, 171.

The effect of the Hartford-Lynch cross-licensing agreement was to permit Lynch to continue in business substantially the same as theretofore (upon its own terms as to

ptice) except that its sale of forming machines embodying Hartford inventions was limited to persons securing forming machine licenses from Hartford, the holder of dominant patents covering the operation of Lynch machines. The agreement also freed Lynch's customers, constituting most of the glass-container industry, from patent litigation and extended, rather than restrained, competition by permitting both Hartford and Lynch to continue to market their machines free from patent litigation and in open and vigorous competition. After 1933 Lynch refrained from selling machines embodying Hartford inventions to those who did not elect to secure a license from Hartford, not because of any restraint imposed by the cross-licensing agreement, but in order not to subject itself, as well as its customers, to injunction and damages for infringement of Hartford patents. Hartford and Lynch exchanged non-exclusive forming machine patent rights which constituted merely a mutual waiver of the right to sue each other upon their respective patents.

General Pictures Co. vs. Electric Co., 304 U. S. 175, 181.

The decision below cannot be affirmed without overruling well established principles decided in *Standard Oil vs. U. S.*, 283 U. S. 163.

It may not be inferred from proof that Lynch accepted a limited non-exclusive license from Hartford, as the holder of dominant patents, and that Lynch abided by the terms of such license, that Lynch thereby joined an illegal conspiracy to restrain trade.

Gas Products Co. vs. Champlin Refining Co., 46 Fed. 2d 511, 514;

Virtue vs. Creamery Package Co., 227 U. S. 8, 33;

Ky. Nat'l Gas Co. vs. Ind. Gas Corp., 118 Fed. 2d 831.

The trial court ignored evidence relating to competition in forming machines prior to and subsequent to 1933 in violation of the test of legality prescribed in *Board of Trade vs. U. S.*, 246 U. S. 231, 238. Not having previously engaged in marketing either feeders or suction machines, Lynch could not, and did not, restrain trade therein by granting, for a limited time, exclusive rights covering possible future Lynch feeder and suction inventions to Hartford and Owens respectively.

Chadeloid Chemical Co. vs. Chambers Co., 243 Fed. 606;
Dry Ice Corp. vs. Josephson, 43 Fed. 2d 408;
Aspinwall Mfg. Co. vs. Gill, 32 Fed. 697;
A. B. Dick Co. vs. Fuller, 188 Fed. 404;
Littlefield vs. Perry, 21 Wall. 205;
Wms. Mfg. Co. vs. United Shoe Mach. Corp., 62 S. C. 1179, 1184;
U. S. vs. United Shoe Mach. Corp., 247 U. S. 32;
United Shoe Mach. Corp. vs. U. S., 258 U. S. 451.

The plaintiff failed to prove the charge contained in the Bill of Complaint, that Lynch, in conspiracy with Hartford and Owens, purchased patent rights of their remaining competitors in forming machines. Lynch did not participate at all in the purchase of O'Neill, and Ed Miller, whose business was acquired by Lynch, was not a competitor of Lynch. Ed Miller made wide-mouth machines upon which narrow-neck ware could not be produced. Lynch made narrow-neck machines upon which a small amount of wide-mouth ware was occasionally produced by some small manufacturers. Hartford was not a substantial competitor of Miller and Owens did not produce or market forming machines at all.

International Shoe Co. vs. Com., 280 U. S. 291, 299.

The matter of the purchase of Ed Miller's business and assets, as distinguished from his patents, was beyond the scope of the issues in the case.

Standard Oil Co. vs. Brown, 218 U. S. 78, 87;
Twachtman vs. Connelly, 106 Fed. 2d 501, 506;
Osage Oil Co. vs. Continental Oil Co., 34 Fed. 2d 585;
Reynolds Spring Co. vs. Young, 101 Fed. 2d 257, 259;
Andrews vs. Drake, 83 Fed. 2d 767, 770;
Drybough vs. Ware, 111 Fed. 2d 548, 551;
U. S. vs. Seminole Nation, 299 U. S. 417, 422;
Amer. Propeller Co. vs. U. S., 300 U. S. 475, 479;
Garrett vs. L. & N. RR. Co., 235 U. S. 308, 312.

The trial court erred in ignoring all findings and conclusions submitted by these appellants and in entering verbatim, biased, conflicting, prejudicial and incomplete findings and conclusions relating to these appellants, as submitted by the plaintiff, in violation of Rule 52 of the Rules of Civil Procedure.

Oil Shares, Inc., vs. Kahn, 94 Fed. 2d 751;
Interstate Circuit vs. U. S., 304 U. S. 55, 57;
Matton Oil Transfer Corp. vs. The Dynamic, 123 Fed. 2d 999;
U. S. vs. Furness, 125 Fed. 2d 928, 942;
Epstein vs. Goldstein, 107 Fed. 2d 755, 758.

The Hartford-Lynch forming machine patent cross-licensing agreement and the Lynch-Hartford feeder patent license agreement were legal and proper.

Standard Oil vs. U. S., 283 U. S. 163, 171.

Since there was no pre-existing competition between

Hartford and Lynch with respect to feeders the forbidden result of restraint of trade in feeders was not produced.

International Shoe Co. vs. Com., 280 U. S. 291, 298;

Commission vs. Raladam Co., 283 U. S. 643, 648.

Section 8 of the Forming Machine Agreement which was cancelled in 1938, long before this action was instituted, was not at issue and did not constitute any restraint upon Hartford's ability to compete with Lynch.

U. S. vs. Gen. Electric Co., 272 U. S. 476, 489.

There is no proof of actual restraint of trade in forming machines. The specific charge in the Bill of Complaint is, that the purpose and effect of the forming machine agreement was to require the purchaser of a Lynch forming machine to use it with a Hartford feeder. The court erroneously found beyond the scope of the issues that certain manufacturers were placed at a competitive disadvantage because they were unable to acquire Lynch machines without a forming machine license from Hartford; that the agreement "bolstered" Hartford's monopoly of feeders. Such control as Hartford may have exercised over the licensing of forming machines arose out of the Headley-Thompson and other Hartford patents and not as a result of the Hartford-Lynch forming machine license agreement.

General Pictures Co. vs. Electric Co., 304 U. S. 175, 181.

There is no definite showing of illegality on the part of Lynch Corporation.

Appalachian Coals, Inc., vs. U. S., 288 U. S. 344, 377.

The court erred in considering evidence and entering findings at variance with and beyond the scope of the issues made by the pleadings.

Harrison vs. Nixon, 9 Pet. 483, 503;
Garrett vs. L. & N. RR. Co., 235 U. S. 308, 313;
U. S. vs. Charpentier, 49 Fed. 2d 399;
Swift & Co. vs. U. S., 196 U. S. 375;
Astor vs. Wells, 4 Wheat. 466;
Barnes vs. Chicago M. & St. P. R. R. Co., 122 U. S.
Washington R. Co. vs. Washington, 10 Wall. 299;
U. S. vs. Seminole Nation, 299 U. S. 417.

Ed Miller was not a competitor of Lynch and the purchase of the Ed Miller business by Lynch, was legal and proper and did not result in an unlawful restraint of trade in forming machines. There was "no pre-existing substantial competition to be effected."

International Shoe Co. vs. Com., 280 U. S. 291.

The complaint charged that the purpose and effect of the forming machine agreement was to require a purchaser of a Lynch machine to use it with a Hartford feeder. The evidence did not disclose that Lynch ever sold any of its machines upon condition that the purchaser should not use or deal in the goods, wares or machinery of a competitor of Lynch Corporation, or that such machines should be used with Hartford or any other feeders. Conclusion of Law No. 65 that the forming machine agreement violated Section 3 of the Clayton Act is obviously erroneous as well as is Paragraph 9 of the judgment enjoining Lynch and all other corporate defendants from future violations of the Clayton Act.

The provisions of the judgment are so vague as to put

the future conduct of the defendants' business at the peril of a summons for contempt.

Swift & Co. vs. U. S., 196 U. S. 396.

The court should have found as requested by these appellants that in 1933 there existed between Hartford and Lynch legitimately conflicting patent interferences, that the interchange of patent rights between said defendants was necessary if technical advancement of glass-forming machines was not to be blocked by continued litigation, that the cross-licensing agreements freed both defendants to employ their respective inventions in free and open competition with each other, and that such agreements promoted competition.

Standard Oil Co. vs. U. S., 283 U. S. 163.

The trial court excluded all evidence showing validity, prior art or infringement in connection with Hartford patents.[72]

All issues with respect to Lynch Corporation and its associated defendants have become moot. On November 12, 1938, Lynch cancelled Section 8 of the forming machine agreement in exchange for the right to sell wide-mouth (Miller) machines without requiring purchasers to secure a license from Hartford, and thereafter Lynch sold such machines without the purchaser securing a license from Hartford. Any issue, whether or not made up by the pleadings, with respect to the validity of Section 8, or regarding restraint of trade with respect to Miller machines has therefore become moot. Prior to the commencement of the trial, in an effort to remove from the case the practices complained of against Lynch, and in response to the trial court's request that the case be settled, Lynch and Hartford, on September 18, 1940, cancelled their previous contract and

[72]Opinion 155-6.

entered into an agreement exchanging non-exclusive rights to use their respective inventions, under which Lynch is licensed to sell narrow-neck as well as wide-mouth machines, embodying Hartford inventions, without requiring the purchasers to secure any license from Hartford. Since September 18, 1940, Lynch has offered and has sold machines to concerns which did not have licenses from Hartford. The amendments in 1938 and the new 1940 agreements have therefore removed from the case any and all issues with respect to the legality of the conduct of these appellants.

Standard Oil Co. vs. U. S., 283 U. S. 163, 182;
U. S. vs. Standard Oil Co., 33 Fed. 2d 617, 629;
Swift & Co. vs. U. S., 196 U. S. 375, 396;
U. S. vs. U. S. Steel Corp., 251 U. S. 417, 445;
Industrial Asso. vs. U. S., 268 U. S. 64, 84;
U. S. vs. U. S. Steel Corp., 223 Fed. 55;
U. S. vs. Pan American Com., 261 Fed. 229;
Cont. Securities Co. vs. I. R. T., 207 Fed. 467;
U. S. vs. DuPont Co., 188 Fed. 127.

The final judgment, as submitted by plaintiff and entered by the court, is not the considered judgment of the court.

Wagon Drivers Union vs. Meadowmoor Dairies, 312 U. S. 287.

The final judgment was entered without giving due consideration to objections submitted by appellants, which resulted in the inclusion of these appellants in drastic injunctive provisions in disregard of the nature of appellants' business and without regard to whether the evidence and findings indicated that these appellants had previously engaged in the practices so enjoined. To justify such restraints as are imposed, it must appear that they bear some resemblance to acts committed in the past or that danger

of their commission in the future is to be anticipated from past conduct. That justification is wholly lacking in the instant case.

Ethyl Corp. vs. U. S., 309 U. S. 436;
Standard Oil vs. U. S., 221 U. S. 1;
Labor Board vs. Express Pub. Co., 312 U. S. 426, 435;
Trade Com. vs. Beechnut Co., 257 U. S. 441, 445-6.

ARGUMENT

The Motion to Dismiss These Appellants Made at the Conclusion of Plaintiff's Case Should Have Been Granted Because:

(a) There Was No Direct Evidence to Sustain the Charge That Lynch Joined the Alleged Conspiracy Nor Can Such a Charge Be Sustained by Any Reasonable Inference From the Evidence.

(b) The Cross-Licensing Agreement of August 23, 1933, Between Hartford and Lynch Was Legal and Proper. There Was No Illegal Restraint of Trade in Forming Machines and No Violation by Lynch of the Clayton Act.

(c) There Was Failure to Sustain the Charge That Lynch Corporation or Its Officers in Conspiracy With Hartford and Owens, Purchased Patent Rights of Their Remaining Competitors in Forming Machines. Lynch Did Not Participate in the Purchase of O'Neill and Miller Was Not a Competitor of Lynch.

At the conclusion of plaintiff's case Lynch Corporation and its associated individual defendants moved to be dismissed.[73] The court, desiring to conclude the taking of

[73] R. 4282.

testimony as soon as possible, postponed the argument and decision upon this motion until after the conclusion of the entire case but agreed that it should be decided "as of the close of plaintiff's case."[74] In order that no rights under the motion might be waived these appellants introduced no evidence in defense but relied upon their motion to be dismissed.

We are now entitled to have this court review the action of the trial court in connection with the motion to dismiss.

This court said in *Maryland Casualty Company vs. Jones*, 279 U. S. 792 at page 795:

> "The right granted by the statute to a review of the rulings made during the progress of the trial, is not lost because of the fact that a general finding or special findings sufficient apparently to support the judgment are thereafter made by the court."

In *Ralston Purina Co. vs. Novak*, 111 Fed. (2) 631 the court used the following language:

> "The overruling of a motion for a directed verdict is waived if the party making it afterwards introduces evidence in his own behalf."

In *Moore vs. Tremelling*, 100 Fed. (2) 39 at page 43 the court stated:

> "Error is assigned (assignment of error No. 51) to the overruling of appellant's motion for non-suit made after the close of the appellee's case. Appellant argues that his motion should have been granted because the evidence showed that the statute of limitations barred recovery. This objection to the court's ruling was waived by the introduction of testimony by appellant. *Columbia and Puget Sound R. Co. vs. Hawthorne*, 144 U. S. 202, 12 S. Ct. 591, 36 L. Ed. 405; *Union Pacific R. Co. vs. Daniels*, 152 U. S. 684, 14 S. Ct. 756, 38 L. Ed. 597; *Sacramento Suburban Fruit*

[74] R. 5813.

Lands Co. vs. Melin, 9 Circ., 36 F. 2d 907, 909; *Mutual Life Ins. Co. vs. Wells Fargo Bank & Trust Co.*, 9 Cir., 86 F. 2d 585; *Humphreys Gold Corp. vs. Lewis*, 9 Cir., 90 F. 2d 896."

In *Citizens Trust & Savings Bank vs. Falligan*, 4 Fed. (2) 481 (cert. denied 269 U. S. 557):

> "The bank assigns error to the denial of its motion for a nonsuit, made at the close of the plaintiff's testimony. The ground of the motion was that there was no evidence to show that the bank participated in or was party to the fraud. The defendant in error contends that the bank waived its motion by its failure to request a peremptory instruction in its favor at the close of all the testimony. After the denial of the bank's motion, Berry testified in his own behalf; but the bank offered no further testimony and stood upon its motion. The defendant in error cites cases holding that a motion for nonsuit is waived, where not renewed in a case where testimony is thereafter taken by the party so moving. In *Columbia Railroad Co. vs. Hawthorne*, 144 U. S. 202, 12 S. Ct. 591, 36 *L. Ed.* 405, it was held that the refusal to direct a verdict for the defendant at the close of the plaintiff's evidence, when the defendant has not rested his case, cannot be assigned as error. It is true that the defendant bank in the present case at no time formally announced that it rested, but that circumstance is deemed of no importance. The controlling fact is that it did not waive its motion. *Kinnear Mfg. Co. vs. Carlisle*, 152 F. 933, 82 C. C. A. 81."

(a) There Was No Direct Evidence to Sustain the Charge That Lynch Joined the Alleged Conspiracy Nor Can Such a Charge Be Sustained by Any Reasonable Inference From the Evidence.

It seems obvious, from an examination of the Bill of Complaint, that Lynch Corporation was included as a party defendant because of some notion on the part of the plaintiff that Lynch had an oral understanding with

Hartford-Empire other than appeared in the written agreements between Lynch Corporation and Hartford-Empire Company. There is no finding of any such understanding nor is there any evidence to support the same. The court in his opinion, at page 18 states, "It is hard to imagine a case in which a court would have more first-hand information of what the parties did and intended than in the case at bar." Again at page 51 the court said, "I repeat that it is not necessary for a court in this case to resort to inferences from either circumstantial or direct evidence." It is apparent that the court did not base his conclusions relating to Lynch on any inference but rather upon letters and documents prepared by defendants other than Lynch.

It is insisted that Lynch did nothing other than it had a legal right to do under the facts as heretofore related.

It is a serious matter to attempt to include within a general charge of conspiracy all those that have had contact in any degree whatever with the principal conspirators. *Direct Sales Co. vs. U. S.*, 63 S. Ct. 1265.

The court specifically found that corporate defendants other than Lynch joined the alleged conspiracy and it is highly significant that there was no special finding that Lynch Corporation joined it. The statement in the judgment that Lynch and others violated the Sherman Act is a mere legal conclusion not based upon any finding. In *Interstate Circuit, Inc., vs. U. S.*, 304 Rep. 55, at page 56, in discussing former Equity Rule 70½ this court said:

> "The statements in the decree that in making the restrictive agreements the parties had engaged in an illegal conspiracy were but ultimate conclusions and did not dispense with the necessity of properly formulating the underlying findings of fact.
>
> "The opinion of the court was not a substitute for the required findings. A discussion of portions of the evidence and the court's reasoning in its opinion do not constitute the special and formal findings by which it is the duty of the court appropriately and

specifically to determine all the issues which the case presents. This is an essential aid to the appellate court in reviewing an equity case (*Railroad Commission vs. Maxcy*, 281 U. S. 82, and cases cited) and compliance with the rule is particularly important in an anti-trust case which comes to this court by direct appeal from the trial court."

The trial court, as well as counsel for the plaintiff below, must have assumed that because officers of defendant corporations other than Lynch exchanged memos among themselves relating to forming machines, that Lynch thereby became a party to the alleged conspiracy, although there was no proof that Lynch ever had any knowledge of such memos. The court completely ignored the precarious patent situation in which Lynch Corporation found itself after the unfavorable Patent Office decision in June, 1933. It is conceded that evidence that one joined an alleged conspiracy may be either direct or circumstantial. In other words, that the agreement to conspire may be proved by direct testimony or it may be inferred from the actions and conduct of the parties involved. There was no direct proof of such an illegal agreement nor was there a finding of any such an agreement. It is certainly improper for the court to impute to Lynch an illegal purpose in acts which when viewed in the light of the existing facts were in and of themselves perfectly legitimate and proper.

In order to establish that Lynch Corporation joined the alleged conspiracy, in the absence of direct proof thereof, the circumstantial evidence of such fact or the inferences to be drawn from the evidence must be to the satisfaction of the court as entirely inconsistent with innocence.

In *United States vs. American Linseed Company*, 275 Fed. 939, the court said, page 941.

"It is incumbent upon the government to show by the clear preponderance of the evidence that the de-

> fendants conspired to restrain interstate commerce. In the absence of direct proof of actual entering into of such a combination, and in the face of the denial under oath of the defendants that any such conspiracy or combination was entered into or made, the government must show that what the defendants did necessarily had the result of restraining trade, or, if it relies upon the circumstantial evidence to show that a conspiracy was actually entered into, it must show to the satisfaction of the court that the circumstances upon which reliance is placed are entirely inconsistent with supposition of innocence."

"Mere knowledge or approval of or acquiescence in the object and purpose of a conspiracy without agreement to cooperate to accomplish such object or purpose is not enough to constitute one a party to the conspiracy." *Lucadamo vs. U. S.*, (C. C. A. 2nd) 280 Fed. 653, 657; *Marrash vs. U. S.*, (C. C. A. 2nd) 168 Fed. 225; *Turcott vs. U. S.*, (C. C. A. 7) 21 Fed. 2nd 829; *U. S. vs. Lancaster*, (C. C. A. Ga.) 44 Fed. 896, 10 L. R. A. 333; *Thomas vs. U. S.*, 57 Fed. 2nd 1039, 1042.

Persons may deal with conspirators without subjecting themselves to becoming co-conspirators. See *U. S. vs. Falcone*, 311 U. S. 205; *Virtue vs. Creamery Package Co.*, 227 U. S. 8.

That there must be evidence of an agreement to conspire is emphasized by the recent case of *U. S. vs. Crimmins*, 123 F. 2d 271 where Judge Learned Hand says:

> "But it does not follow, because a jury might have found him guilty of the substantive offense, that they were justified in finding him guilty of a conspiracy to commit it. Courts do indeed say that such conspirator is chargeable with the acts of his fellows done in furtherance of the joint venture; but into that must be read the condition that acts so imputed must be in execution of the venture as all understand it; not indeed in its details, but so far as concerns those terms which constitute the

> substantive crime. It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding."

From the foregoing it would seem plain that memos and letters containing declarations alleged to have been made incident to an unlawful conspiracy but not shown to have been communicated to the alleged co-conspirator, although admissible in evidence as against their authors, cannot be considered by the court as imputing concurrence in the alleged conspiracy of such alleged co-conspirator. See *Glasser vs. U. S.*, 62 S. C. 457, 467.

In *Mayola vs. United States*, 71 F. 2d 65, at page 67 the Circuit Court of Appeals of the 9th Circuit says:

> "(3, 4) There is another reason for the rejection of this testimony. It is held, in *Kuhn vs. U. S.*, 26 F. (2d) 463 (C. C. A. 9), that the declarations of one co-conspirator to another are not competent to establish the connection of a third person with the conspiracy. This is followed in *Mimmer vs. U. S.*, 57 F. (2d) 506, 511 (C. C. A. 10), and again by the same circuit in *Thomas vs. U. S.*, (C. C. A.) 57 F. (2d) 1039, 1041. The Circuit Court of Appeals for the Sixth Circuit, in *Nibbelink vs. U. S.*, 66 F. (2d) 178, 179, following, but not citing, *Pope vs. U. S.*, 289 F. 312, 315 (C. C. A. 3), and *Kelton vs. U. S.*, 294 F. 491, 495 (C. C. A. 3, says: '* * * Before the declarations of co-conspirators can be received in evidence against one charged with participating in the conspiracy, it must be shown by independent evidence that the conspiracy existed and that the accused was a party to it at the time the declarations were made.'"

A more or less recent case involving a discussion of inferences drawn from the conceded facts is that of *Interstate Circuit vs. U. S.*, 306 U. S. 208, which was a case, the facts of which led to but one conclusion by reason of the

inferences drawn therefrom. The court at page 226 stated:

> "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it."

It can not successfully be contended that Lynch participated in any scheme other than to continue to conduct its business in the same manner as in the past but under a license from Hartford, as owner of the dominant patents, to use such patents.

In order to make out unlawful conspiracy something more than mere uniformity of action must be shown. *Frey & Son vs. Packing Co.*, 256 U. S. 208. To warrant the injunction invalidating such transactions, there must be a "definite factual showing of illegality," a clear purpose to monpolize or restrain trade. *Oil Co. vs. U. S.*, 283 U. S. 163, 179.

A speculative inference will not suffice nor will it be permitted to base an inference upon an inference. *Cf. Terminal Warehouse vs. Penn. Co.*, 297 U. S. 500, 516. It can not be inferred that Lynch had knowledge of the contents of memos of others and upon such inference base a further inference that Lynch agreed to such contents. *Grand Trunk vs. Holstein*, 67 F. (2) 780; *Parker vs. Gulf Refining Co.*, 80 F. (2) 795.

During plaintiff's case T. C. Werbe, president of Lynch Corporation, was cross-examined by plaintiff's counsel at considerable length[76] and there was introduced in evidence the several agreements between Hartford, Lynch and Owens and a number of other exhibits in the nature of correspondence between Lynch Corporation and others. There was also introduced certain memoranda and inter-office communications prepared by individual defendants other than those connected with Lynch Corporation.

[76] R. 2690-2836.

All of the evidence, oral and documentary, was tendered and received subject to each defendant being connected with the alleged conspiracy and subject to a general objection by each of the defendants, that all of such evidence was irrelevant, immaterial, and incompetent for all purposes, including the purpose of connection.[77] The government, and apparently the court, relied upon these memos prepared by other defendants in finding that Lynch Corporation agreed to the alleged conspiracy. No evidence was introduced from which it could be even inferred that Lynch Corporation or its officers had any knowledge of the contents of such exhibits to say nothing of agreeing thereto.

In *Glasser vs. U. S.*, 62 S. C. 457, at page 467 this court said:

> "However, such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliundi* that he is connected with the conspiracy."

See also *Minner vs. U. S.*, 57 Fed. Rep. 2d 506; and see *Nudd vs. Burroughs*, 91 U. S. 426.

There was no evidence connecting Lynch with the alleged conspiracy with respect to forming machines. Certainly its written contracts with Hartford and Owens, and correspondence between the parties with respect to compliance with the terms thereof, viewed in the light of existing conditions, is not evidence of any conspiracy. The evidence showed that Lynch entered into a cross-licensing agreement with Hartford and, in consideration of the payment of $125,000.00 by each, that Lynch gave Hartford and Owens, respectively, exclusive rights to Lynch's feeder and suction inventions. The parties had a legal right to enter into such agreements, to evaluate their respective claims.

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[77]R. 642-5, 658, 662, 3025-6.

No improper inference can be drawn from such action particularly in the absence of any proof of actual restraint of trade in the subject matter of the agreements. It should be borne in mind that at that time the parties were settling all of their patent controversies after bitter and expensive patent litigation which lasted over five years. In *Standard Oil vs. U. S.*, 283 U. S. 163, this court stated:

> "Where there are legitimately conflicting claims or threatened interferences, a settlement by agreement, rather than litigation, is not precluded by the Act. Compare *Virtue vs. Creamery Package Co.*, 227 U. S. 8, 33. An interchange of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims is frequently necessary if technical advancement is not to be blocked by threatened litigation."

Again in *U. S. vs. United Shoe Co.*, 247 U. S. 32, at page 52 this court said:

> "The value of a settlement of a dispute about rights which has reached litigation or threatens it can not be easily or accurately estimated. It depends upon too many considerations which are not reflected in the price paid."

The evidence further disclosed that Lynch respected the terms of its limited license from Hartford and refrained from selling forming machines covered by Hartford patents to two manufacturers—Reed and Obear-Nester—who did not elect to secure a license to use such machines from Hartford. Of course, Lynch could not afford to do otherwise. There was likewise evidence in the form of letters from Reed and Obear-Nester, glass manufacturers, in which they complained that they were unable to secure the more efficient Lynch machines without obtaining a forming machine license from Hartford but the evidence also discloses that these companies not only continued to manufacture glassware in competition with the

rest of the industry but also maintained their production and even increased their relative positions in the industry.[78] There was also evidence that Lynch purchased the assets of Ed Miller as indicated on pages 11-13 hereof.

It is admitted by the pleadings and the evidence shows that, after five years of litigation at a cost to Lynch of $250,000, in June, 1933, the Patent Office granted priority to the Headley and Thompson patents. This decision necessitated and brought about the Hartford and Lynch cross-licensing agreement under attack. Similar conduct was approved by this court in the case of *International Shoe Company vs. Federal Trade Commission*, 280 U. S. 291, at page 301, where the court stated:

> "It was suggested by the court below, and also here in argument, that instead of an outright sale, any one of several alternatives might have been adopted which would have saved the property and preserved competition; but, as it seems to us, all of these may be dismissed as lying wholly within the realm of speculation."

Under this agreement Lynch obtained a non-exclusive license to make and deliver forming machines embodying Hartford inventions to anyone that had obtained from Hartford a license under Hartford's forming machine inventions.

Although the court erroneously refused to so find, the evidence clearly shows that the agreements did not restrain but promoted competition between Lynch and Hartford so that no conspiracy to restrain trade may be inferred in this case as it has in other cases where actual restraint of trade resulted after the execution of the contracts. See *Apex Hosiery Co. vs. Leader*, 310 U. S. 496, at page 500:

> "In the cases considered by this court since the *Standard Oil* case in 1911 some form of restraint of commercial competition has been the *sine qua non*

[78] R. 8550, Exhibits 6087-8, R. 16247-8. Obear-Nester's production indicated by line 13 and Reed's by line 15 on exhibits.

> to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition."

The fact that Lynch might have known that Hartford owned basic glass feeder patents and owned the dominant Headley and Thompson patents covering formers would not, by itself, cause Lynch to become a party to a conspiracy in restraint of trade by accepting a forming machine license. In *Virtue vs. Creamery Package Co.*, 227 U. S. 8, 33, the Owatonna Company, sought to be held as a co-conspirator, had granted exclusive patent rights to a member of a monopoly in restraint of trade but this court said:

> "It would be far-fetched to say that the Owatonna Company could not assert rights or protect rights because they were asserted or sought to be protected against corporations which had become members of an illegal combination, without participating in the guilt of such combination and becoming a joint conspirator in its purposes."

There was no evidence of an agreement on the part of Lynch Corporation other than the written cross-licensing agreement nor is there any proof of any other understanding or agreement. It must be apparent that the reasons which prompted the execution of the cross-licensing agreement effectively disposes of any claim of conspiracy

based upon inference drawn therefrom. The sole interest and purpose of Lynch, as the facts clearly indicate, was to negotiate the best settlement possible in order to continue its business and protect its customers. Lynch could not continue its business without a license from the owner of the dominant patents.

Decisions of the Supreme Court draw a distinction between conspiracies to fix prices and other agreements which may have the effect of restraining trade. As pointed out in *U. S. vs. Socony Vacuum Oil Co.*, 310 U. S. 150, 225, an agreement to fix prices in itself constitutes an unlawful conspiracy under Section 1 of the Sherman Act but in the *Apex Hosiery* case, 310 U. S. 469, the court held that although trade was restrained the purpose of the defendant was to unionize the Hosiery Company and, therefore, the defendants neither conspired nor actually restrained trade as contemplated by the Sherman Act. In the instant case regardless of thoughts and purposes expressed in memoranda of officers of Hartford and Owens, for which Lynch is not responsible, the evidence is uncontradicted that Lynch's purpose and intent in accepting a license from Hartford was to settle patent litigation.[79] See *U. S. vs. Oil Co.*, 310 U. S. 150, note 59 at page 226.

The evidence is likewise uncontradicted that Lynch's principal object in acquiring Ed Miller's business was to enter an allied field of machinery business in case it could not continue its then only business of selling narrow-neck forming machines. There is not even a scintilla of evidence indicating any agreement on the part of Lynch Corporation or its officers to fix prices or otherwise to restrain trade in machinery or glassware. Under the cross-licensing agreements Lynch as well as Hartford were permitted to and did

[79]Preamble Exhibit 330, R. 9067-8; Werbe's testimony, R. 2702, 2704, 2709, 2713, 2715, 2720, 2724-5, 2743, 2752, 2755, 2763-5, 2767, 2775-6, 2790-1, 2832-3, 2840; Ex. 1042; Werbe's letter to C. F. Miller, R. 13691-2.

distribute their respective forming machines at their own terms as to prices and the competition between Lynch and Hartford which existed prior to 1933 became keener after the cross-licensing agreement was executed.[80] The only effect of the cross-licensing agreement was to deprive two manufacturers of the use of Lynch machines embodying Hartford inventions because they were unwilling to secure a forming machine license from Hartford.

There must be a definite factual showing of illegality, 283 U. S. 163, at 179, 288 U. S. 434, 377. Under the circumstances it seems impossible to find any intent on the part of Lynch Corporation to do anything other than to continue its business in which it had been engaged successfully for many years and that, but for the Headley and Thompson controversy, which lasted for a period of over five years and which was finally lost by Lynch Corporation, Lynch Corporation would have continued in business free and clear of all patent controversies.

In the absence of any direct proof of conspiracy under Section 1 of the Act just what is there that would permit of an inference of conspiracy? "The question is one of intent and effect, not to be determined by arbitrary assumptions." *Appalachian Coals, Inc., vs. U. S.*, 288 U. S. 344, 361.

(b) The Cross-Licensing Agreement of August 23, 1933, Between Hartford and Lynch Was Legal and Proper. There Was No Illegal Restraint of Trade in Forming Machines and No Violation by Lynch of the Clayton Act.

With respect to the Hartford-Lynch cross-licensing agreement the Bill of Complaint charged that on August 23, 1933, Owens and Hartford induced Lynch to join the conspiracy for the purpose of securing

[80] R. 2849, 2879, 5807-8, 5812.

(1) a monopoly of patents on glass-forming machinery,

(2) a control of the issuance of licenses thereunder, and

(3) restraint of trade in such machinery and glassware,[81]

(4) that on August 23, 1933, Lynch and Hartford entered into the cross-licensing agreement and pursuant to an understanding Lynch refused to sell forming machines to non-feeder licensees of Hartford,[82]

(5) that the purpose and effect of the agreement is to compel a purchaser of a Lynch forming machine to use a Hartford feeder,[83]

(6) that by reason of the aforesaid and Lynch's purchase of O'Neill and Miller rights Hartford, Owens and Lynch achieved a virtual monopoly with respect to patents covering glass-forming machinery and such machinery.[84]

The court found as admitted by the pleadings that by the year 1927, 70% of the narrow-neck forming machines in use were Lynch machines and that in 1927 Lynch patent applications were placed in interference with those of Headley and Thompson.[85] Although admitted by the pleadings, the court failed to find as requested by Lynch, that Lynch engaged in an extended controversy at a cost to Lynch of approximately $250,000 regarding the priority of Lynch forming machine patents and that in June, 1933, priority was granted to the Headley and Thompson patents then under option to and thereafter purchased by Hartford.[86] The evidence clearly indicated that Lynch's purpose in executing the cross-licensing agreement was to settle patent litigation.[87] Lynch had failed in its effort to settle

[81]Par. 111, Complaint, R. 34.
[82]Pars. 114-117, Complaint, R. 35.
[83]Par. 118, Complaint, R. 36.
[84]Par. 121, Complaint, R. 36.
[85]Findings 313, 315, R. 7345.
[86]Complaint 113, Lynch Answer 33, R. 35, 230.
[87]Preamble Ex. 330, R. 9067-8.

the patent interference with Whitall-Tatum in 1931 and in the face of the adverse decision its right to continue in business in the future was in jeopardy.[88] Although Lynch could have appealed from the adverse decision or filed an independent suit in equity[89] it was advised by its counsel that certain fundamental claims of Headley and Thompson would ultimately be allowed.[90] The evidence discloses, that prior to the decision in 1933 granting priority to Headley and Thompson applications, Lynch had certain patents which it asserted covered Hartford machines and Hartford had patents which it asserted covered the Lynch machines; that Lynch and Hartford had interchanged notices of infringement (see page 11). But the court ignored this evidence and also the Headley and Thompson decision although requested by Lynch to make such findings.[91]

In view of these conflicting claims the parties, therefore, entered into a perfectly legitimate cross-licensing agreement. The Supreme Court has recognized and approved the legality and desirability of cross-licensing agreements between owners of conflicting patent claims, *Standard Oil Co. vs U. S.*, 283 U. S. 163.

The many advantages of such agreements in the past have been generally conceded by manufacturers and others having to do with patents and patent processes. Had it not been for cross-licensing agreements it would be difficult as a practical matter to weigh the loss and to enumerate the instances in which patents would have been blocked and business curtailed by inefficient machinery.

It may be even of greater importance in the future particularly with patents relating to electrical devices, chem-

[88]R. 2743, 2752, 2765, 2832.
[89]Ex. 312, R. 12870.
[90]R. 2743.
[91]Lynch proposed findings 4(a)-(c), R. 7214-15.

istry and plastics, now in process of development, to mention but a few.

Innumerable conflicts of different degrees of importance must have arisen in the past relating to patents, the blocking of which has been averted by means of cross-licensing agreements. It must be apparent that the greatest confusion, tremendous litigation expense and great loss would be caused in the absence of the right to utilize such agreements. It would unquestionably be a backward step in the jurisprudence of this country to refuse recognition of the validity of such agreements executed under proper and reasonable conditions. The direct effect of failing to recognize such validity would be to cause the elimination of competition which in itself would create a serious situation in a comparatively short time; inventive genius would be discouraged; progress in practically all types of industry would be curtailed and the government would be the only one which could deal in patents with any degree of safety.

The chairman of the War Production Board on July 28, 1943, suggested to the Attorney General a form of cross-license agreement applicable to the rubber industry. Fed. Reg. July 30, 1943, L-10647.

The *purpose* of Lynch in taking a Hartford license was to terminate expensive litigation and to continue in the narrow-neck forming machine business.

The *effect* of the cross-licensing agreement was to:

1. Permit Lynch to continue in business substantially as before (upon its own terms as to price) except that its sale of forming machines embodying Hartford inventions was limited to persons securing a forming machine license from Hartford, the owner of the Headley and Thompson and other important patents covering such machines.

2. Free substantially all of Lynch's customers using Lynch machines from patent litigation.

3. Permit Hartford feeder licensees who were using Lynch machines to continue to use such machines, without additional royalty and free from patent litigation.

4. Permit Hartford feeder licensees not using Lynch machines to obtain such machines without payment of additional royalty.

5. Permit anyone obtaining a forming machine license from Hartford to purchase forming machines embodying Hartford inventions from Lynch.

6. Extend (rather than restrain) competition by permitting both Hartford and Lynch to continue to market their respective forming machines free from patent litigation and possible damages for infringement.

7. Accord equal treatment to Hartford feeder licensees using Lynch machines with those not using such machines.

The contract did not restrain either party in the conduct of its respective business but, on the contrary, the rights of both were enlarged. The effect, therefore, was not to restrain trade but rather to continue and extend it. Although Lynch did not obtain the right to sell machines embodying Hartford inventions to those who did not elect to secure a license from Hartford, nevertheless Lynch did not agree or bind itself to Hartford not to sell its machines to persons not obtaining such a license.

The rights exchanged between Hartford and Lynch were nonexclusive which constituted a mere virtual waiver of the right to sue each other upon their respective patents. *Gen. Pictures Co. vs. Electric Co.*, 304 U. S. 175, 181.

We desire to discuss at this time what is probably the pivotal and decisive authority applicable to the Hartford-Lynch cross-licensing agreements. The cross-licensing agreement here involved was entered into following the decision in *Standard Oil Co. et al. vs. U. S.*, 283 U. S. 163, the opinion in which should be read bearing in mind that

Hartford-Empire owned the basic and dominant patents relating to the manufacture of narrow-neck forming machines, that Lynch engineers at the conclusion of five years of patent litigation could find no method to circumvent such patents, that Lynch was substantially in the position of a licensee, and that Lynch should not be held responsible for the acts of Hartford-Empire relative to the conduct of Hartford's business in the assertion of its patent rights. The obvious reason why Hartford permitted Lynch to continue in the narrow-neck forming machine business at all was because a great many of Hartford's customers were using and preferred to use Lynch forming machines.

In the *Standard Oil* case, suit to enjoin violations of Section 1 and Section 2 of the Sherman Act was instituted against four primary defendants and others charging that the four primary defendant oil companies (which owned competing patents covering their respective cracking processes, three of which were major producers of cracked gasoline) with violation of the Act. In 1920 litigation developed concerning the validity, scope and ownership of issued patents, one infringement suit was begun, cross notices of infringement were given and interferences were declared on pending applications. Contracts were entered into by the four primary defendants by virtue of which each company acquired the right to use patents of the others in its own process and each was to share, in some fixed proportion, royalties received under licenses executed by the four companies. Each of the four companies had separate and distinct processes covered by separate and distinct patents and neither owned nor controlled any basic or dominant patent. Partial relief was granted to the plaintiff below and upon appeal the government made five complaints relative to the foregoing facts as follows, all of which were overruled by the court:

1. That interstate commerce was unlawfully re-

strained by reason of the pooling contracts and competition was eliminated as between the companies tending to increase the cost of cracked gasoline.

2. The competitive advantages of the primary defendants enabled them to exclude from interstate commerce cracked gasoline which under lawful rates would be produced by rivals.

3. The contracts violate the Act because they enable the primary defendants to maintain existing royalties and thereby restrain interstate commerce.

4. That the primary defendants practically controlled the output and prices of cracked gasoline.

In connection with the first complaint the court said in part at page 170:

> "The only restraint thus charged is that necessarily arising out of the making and effect of the provisions for cross-licensing and for division of royalties.
>
> "The government concedes that it is not illegal for the primary defendants to cross-license each other and the respective licensees; and that adequate consideration can legally be demanded for such grants. * * * Such provisions for the division of royalties are not in themselves conclusive evidence of illegality. Where there are legitimately conflicting claims or threatened interferences, a settlement by agreement, rather than litigation, is not precluded by the Act. Compare *Virtue vs. Creamery Package Co.*, 227 U. S. 8, 33. An interchange of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims is frequently necessary if technical advancement is not to be blocked by threatened litigation. If the available advantages are open on reasonable terms to all manufacturers desiring to participate, such interchange may promote rather than restrain competition."

It will be noted that the last two sentences refer to different subjects. The first related to blocking technical

advancement and the second related to competition. The opinion of the court cannot be construed as meaning that a cross-licensing agreement cannot be entered into unless the available advantages are open on reasonable terms to all manufacturers desiring to participate as contended by plaintiff below. See Notes 5 and 6 at page 171 of the opinion.

In connection with the second complaint the court said in part at page 172:

> "This argument ignores the privileges incident to ownership of patents. Unless the industry is dominated, or interstate commerce directly restrained, the Sherman Act does not require cross-licensing patentees to license at reasonable rates others engaged in interstate commerce. Compare *Bement vs. National Harrow Co.*, 186 U. S. 70; *United States vs. General Electric Co.*, 272 U. S. 476, 490. The allegation that the royalties charged are onerous is, standing alone, without legal significance; and, as will be shown, neither the alleged domination, nor restraint of commerce has been proved."

In the instant case the trial court excluded all evidence relating to infringement of Hartford patents (Opinion, pp. 155-6).

In connection with the third complaint the court outlined the provisions of the agreements between the primary defendants and then said at page 174:

> "The rate of royalties may, of course, be a decisive factor in the cost of production. If combining patent owners effectively dominate an industry, the power to fix and maintain royalties is tantamount to the power to fix prices. Where domination exists, a pooling of competing process patents, or an exchange of licenses for the purpose of curtailing the manufacture and supply of an unpatented product, is beyond the privileges conferred by the patents and constitutes a violation of the Sherman Act. The lawful individual monopolies granted by the patent

> statutes cannot be unitedly exercised to restrain competition. But an agreement for cross-licensing and division of royalties violates the Act only when used to effect a monopoly, or to fix prices, or to impose otherwise an unreasonable restraint upon interstate commerce."

Questions pertaining to royalties, the fixing of prices with respect to forming machines and competing process patents were not involved in the instant case.

In connection with the fourth complaint the court analyzed the evidence for the purpose of ascertaining the operation and effect of the challenged contracts and at pages 175 to 179 said in part:

> "This development and commercial expansion of competing processes is clear evidence that the contracts did not concentrate in the hands of the four primary defendants the licensing of patented processes for the production of cracked gasoline. Moreover, the record does not show that after the execution of the agreements there was a decrease of competition among them in licensing other refiners to use their respective processes. * * *
>
> "Under these circumstances the primary defendants could not effectively control the supply or fix the price of cracked gasoline by virtue of their alleged monopoly of the cracking processes, unless they could control, through some means, the remainder of the total gasoline production from all sources. Proof of such control is lacking. * * *
>
> "In the absence of proof that the primary defendants had such control of the entire industry as would make effective the alleged domination of a part, it is difficult to see how they could by agreeing upon royalty rates control either the price or the supply of gasoline, or otherwise restrain competition."

It will be noted that the defendants were free to license others to use the process covered by the patents just as in the instant case Hartford and Lynch were free to license

others to employ their respective combined inventions and were also free to market their respective forming machines embodying inventions of both, in competition with each other.

The court closed the case relating to the remaining issues by holding them to be moot. This is discussed in a later part of this brief.

It is apparent from the foregoing examination that there was much more justification for the agreement now before the court than those involved in the *Standard Oil* case. First, because here there are basic dominant patents involved while such do not exist in the oil case and which prompted the government in the oil case to charge lack of good faith in connection with the contracts. Second, there was a pooling of the patents of the four companies in the oil case while here there was simply an exchange of non-exclusive licenses. Third, there was no provision regarding a division of royalties here while there was in the oil case. Fourth, there was obviously less real conflict existing between the parties relating to their patents in the oil case than exist in this case. Fifth, either of the companies in the *Standard Oil* case could probably have continued in business while here Lynch could not have done so without a license from Hartford.

The only criticism of the agreement in the instant case related to Section 8 which was desired by Lynch in order to have some protection against Hartford's declining to issue forming machine licenses for Lynch machines.[92] There is no evidence of actual restraint in the distribution of forming machines nor is there any finding thereof. Finding No. 335[93] recites that during the existence of Section 8 Hartford never distributed more than 40% of the aggregate number of forming machines distributed by Hartford and

[92]R. 2883.
[93]R. 7349.

Lynch and that Section 8 constituted a substantial restraint upon Hartford's ability to compete with Lynch. Inasmuch as there was absolutely no evidence to show that Hartford, at any time prior to the cancellation of Section 8, could have produced or sold more than 40% of the aggregate output of the two companies, that portion of the finding which states that Section 8 constituted a substantial restraint upon Hartford's ability to compete with Lynch is a mere conclusion. It should not and cannot be accepted as a finding of fact. It cannot. therefore, have the effect of overcoming the finding that Hartford never reached the 40% figure. There was, therefore, no actual restraint of trade in forming machines. Since Lynch agreed to and actually did cancel Section 8 in 1938 in exchange for the right to sell all Miller (wide-mouth) machines without requiring the purchasers to secure a forming machine license from Hartford there obviously was no actual restraint in the distribution of forming machines imposed by Section 8. See *U. S. vs. United Shoe Mach. Co.*, 247 U. S. 32.

From the foregoing it appears clear that the cross-licensing agreement in the instant case is fully and completely approved by this court in the *Standard Oil* case.

We now turn to the question whether Lynch, by accepting a limited license from Hartford as the holder of the dominant patents and by abiding by the terms of such a license, thereby participated in an actual unlawful restraint of trade from which it might be inferred that Lynch was guilty of conspiring to restrain trade. The taking of a license from a member of an illegal combination does not make the licensee a party to the combination, *Gas Products Co. vs. Champlin Refining Co.*, 46 F. 2d 511, 514. Neither does the granting of a license to an illegal combination make the grantor a member thereof. *Virtue vs Creamery Package Co.*, 227 U. S. 8, 33. A party to a contract containing rea-

sonable restraints of trade is not in *pari delicto* with other parties to such contract who have utilized it to bring about an illegal restraint of trade. *Ky. Nat'l Gas Co. vs. Ind. Gas Corp.*, 118 Fed. 2d 831.

Although the court made no specific finding of fact that Lynch unduly restrained trade in patents relating to forming machines or in glass machinery, in concluding that Lynch violated the anti-trust law the court overlooked the fact that the Sherman and Clayton Acts prohibit substantial restraints upon trade and commerce. In refusing to enter findings proposed by these appellants supported by the evidence relating to competition in forming machines prior to and subsequent to the August 23, 1933, agreement,[94] the court ignored the test of legality prescribed in *Board of Trade vs. U. S.*, 246 U. S. 231, 238, wherein the court says:

> "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

The trial court violated the principles enunciated above.

It will be noted that in the instant case Lynch conveyed no patents or other property to Hartford but in consideration of the right to employ Hartford inventions in its own machines, it, in turn, gave Hartford the right to employ

[94] Lynch Proposed Findings 3, 16-19, R. 7213-14, 7222-26.

Lynch inventions in Hartford machines. Lynch for a valuable consideration gave Hartford an exclusive right to use any Lynch feeder inventions limited to a period of 17 years. The agreement regarding feeder inventions in itself was certainly not illegal as an unreasonable restraint. It was limited in both time and subject matter. *Chadeloid Chemical Co. vs. H. B. Chambers Co.*, 243 F. 606 (C. C. A. 2, 1917); *Dry Ice Corp. vs. Josephson*, 43 F. (2d) 408 (D. C. E. D. N. Y., 1930); *Aspinwall Mfg. Co. vs. Gill*, 32 F. 697 (C. C. D. N. J., 1887); *A. B. Dick Co. vs. Fuller*, 198 F. 404 (D. C. S. D. N. Y., 1912); *Littlefield vs. Perry*, 21 Wall. 205 (1874).

In the recent case of *Wms. Mfg. Co. vs. United Shoe Machinery Corp.*, 62 S. C. 1179, at page 1184 the dissenting opinion points out that the United Shoe Machinery Corp. combined in one enterprise the more important companies in the shoe machinery industry and brought under unified control the multitude of patents which those companies owned, and that since 1899 such company has continuously and overwhelmingly dominated the industry. In 1917 in *U. S. vs. United Shoe Machinery Corp.*, 247 U. S. 32, the Supreme Court held that "Where machines were patented and, though used collectively in the making of a single product, were so distinct in their functions that they were practically non-competitive, a common control over their manufacture and use, was not obnoxious to the anti-trust act." Thereafter an action was brought by the government against the United Shoe Machinery Corp. under the Clayton Act and in *United Shoe Machinery Corp. vs. U. S.*, 258 U. S. 451, the court sustained a decree of the District Court enjoining the company from the use of certain restrictive clauses in its machinery licenses in violation of Section 3 of the Clayton Act. But the court did not nor has it in any subsequent case overruled the principles decided in the first *Shoe Machinery* case with respect to what constitutes a violation of the Sherman Act. The court

below in the instant case failed to distinguish between the acts prohibited by the Sherman Act and those acts having a tendency to promote monopoly prescribed by the Clayton Act.

Since the cross-licensing agreements by their terms were legal and the settlement of patent litigation appropriate, the trial court's conclusion that the forming machine agreement and compliance with the terms thereof by Lynch Corporation were illegal is based upon an arbitrary assumption and is erroneous.

(c) There Was a Complete Failure to Sustain the Charge That Lynch Corporation, in Conspiracy With Hartford and Owens, Purchased Patent Rights of Their Remaining Competitors in Forming Machines.

Lynch did not participate in the purchase of O'Neill, and Miller was not a competitor of Lynch although the latter question is not an issue in the case.[95]

We again call attention to the answer of Lynch Corporation in which it is stated that the assets and business of Ed Miller Machine and Mold Company was purchased and that the same was not a competitor of Lynch Corporation,[96] so that Lynch Corporation went on record at the earliest possible moment in the trial of the case advising of just what action it had taken with reference to this purchase which is specified in the Bill of Complaint as limited to patents only.[97] Had the plaintiff below desired to create an issue relating to the acquisition of the assets and business of Miller the Bill of Complaint could have been amended before as well as during the trial, but plaintiff did not elect to do so.

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[95]See Findings 183, 305, 310, R. 7316, 7343-5.
[96]R. 231.
[97]R. 36.

As previously indicated on page 3 with respect to Lynch's purchase of the assets of Ed Miller, the complaint charged that Hartford, Owens, and Lynch combined to acquire patent rights of their remaining competitors in forming machines and pursuant to that combination, Lynch, with funds supplied by Hartford and Owens, purchased the patent rights of their remaining competitors in forming machines—O'Neill Machine Company and Ed Miller Machine and Mold Company—and transferred certain of said patents to Hartford and certain to Owens.[98] The evidence failed to disclose any connection of Lynch with the O'Neill transaction and there is no finding by the court of any such connection by Lynch. As we shall hereinafter demonstrate, Ed Miller was not a competitor of Lynch. Hartford was not a substantial competitor of Ed Miller because it did not actively promote any press and blow machine from 1928 to 1933,[99] and Owens did not produce or market forming machines at all.

For many years prior to 1933 Lynch had made narrow-neck machines only. Ed Miller Machine and Mold Company had made presses and press and blow machines, frequently called wide-mouth machines. These machines are used for making a different type of ware than the narrow-neck forming machines. Neither Lynch nor Miller had ever manufactured glassware. Miller discontinued making narrow-neck forming machines for Root Glass Company on September 16, 1932.[100] It is impossible to make narrow-neck ware on wide-mouth machines. While it is possible to make some semi-wide-mouth ware on Lynch narrow-neck machines, the operation is not efficient and the quality is not good.[101] A manufacturer of narrow-neck ware could

[98]R. 36.
[99]R. 5645.
[100]Finding of Fact 251, R. 7332.
[101]R. 2698.

not use wide-mouth machines, and, of course, was not a prospective customer of Miller. A manufacturer of wide-mouth ware could not efficiently use narrow-neck machines, nor produce good quality ware and was, therefore, not a prospective customer of Lynch. A few manufacturers of narrow-neck ware, who did not make enough wide-mouth ware to justify the purchase of a wide-mouth machine, occasionally made a limited amount of wide-mouth ware on narrow-neck machines.[102] This was usually done to fill out some line of ware to satisfy a regular customer. There was no evidence to show that either Miller or Lynch ever lost a sale of a machine to the other.

Plaintiff as well as the court took the position that because a small amount of wide-mouth ware may be made on narrow-neck machines Miller was a competitor of Lynch. This was based exclusively upon the guess of Mr. Werbe[103] using which as a premise it was calculated that a certain percentage of wide-mouth ware was made on narrow-neck forming machines on the basis of the output of the entire industry. See *U. S. vs. United Shoe Mach. Co.*, 247 U. S. 32. The syllabus states "where machines were patented and, though used collectively in the making of a single product, were so far distinct in their functions that they were practically non-competitive, a common control over their manufacture and use, held not obnoxious to the anti-trust Act." The presidents of Hartford and Lynch each testified that Miller was not a competitor of Lynch.[104] If there was any doubt about the matter plaintiff had the entire industry available to refute it. In *International Shoe Co. vs. Com.*, 280 U. S. 291, 299, the court says: "The existence of competition is a fact disclosed by observation rather than by the processes of logic; and when these officers, skilled in the

[102]R. 2693.
[103]R. 2846-7.
[104]R. 1465, 2709.

business which they have carried on, assert there was no real competition in respect to the particular product, their testimony is to be weighed like that in respect of other matters of fact."

Incident to the purchase of Miller's assets Lynch secured four patents, one of which related to feeders. This patent was not transferred to Hartford but under the Lynch-Hartford feeder license agreement[105] Lynch granted Hartford an exclusive right under Lynch's feeder inventions until January 1, 1951, which grant included the feeder patent Lynch acquired from Miller. This license was made non-exclusive September 18, 1940. There is no evidence indicating that Hartford ever used or sought to enforce this Miller patent or that it was of any value.

Lynch obligated itself to purchase the Miller business prior to entering into negotiations with Hartford seeking to settle its patent interference with Headley and Thompson.[106] Lynch purchased the Miller business because of its desire to expand its business, spurred on by a very serious patent controversy which might have required it to have discontinued its narrow-neck business.[107]

The court below not only found (unsupported by and contrary to the evidence) that Miller was a competitor of Lynch[108] but concluded as a matter of law that the cross-licensing agreements between Hartford and Lynch, Owens and Lynch and the purchase of Ed Miller violated Section 2 of the Sherman Act in that they were contracts and combinations to monopolize patents, machinery and glassware.[109] The court also concluded that Lynch's purchase of Miller's business was illegal under Sections 1 and 2 of the Sherman Act.[110] Both of the above conclusions are un-

[105]Ex. 329, R. 9065-7.
[106]R. 2746-7, 2752.
[107]R. 2743.
[108]Finding 322, R. 7346.
[109]Conclusion 63, R. 7415.
[110]Conclusion 64, R. 7415.

supported by the evidence and are beyond the scope of the issues.

The court did not find nor did the evidence disclose that Lynch combined with Hartford and Owens to acquire the patent rights of their remaining competitors as alleged in the Bill of Complaint. A careful examination of the Bill of Complaint will disclose that the issue relating to Miller had to do only with patents and no reference was made to the acquisition of the assets of Miller.

"It is a familiar and elemental rule that pleadings and proof must reasonably correspond. *Standard Oil Co. vs. Brown,* 218 U. S. 78, 87." *Twachtman vs. Connelly,* 106 Fed. 2d 501, 506. Issues not raised by the pleadings cannot be determined, and a decree insofar as it undertakes to decide issues not made up by the pleadings is void, *Osage Oil Co. vs. Continental Oil Co.,* 34 Fed. 2d 585. *Reynolds Spring Co. vs. Young,* 101 Fed. (2) 257, 259, the court stated:

> "In equity the proof must conform to the allegations, and the examination of the court is confined to the issues made by the pleadings. *Providence Rubber Company vs. Goodyear,* 9 Wall. 788, 799, 804, 19 L. Ed. 566; *Agawan Woolen Company vs. Jordan,* 7 Wall. 583, 610, 19 L. Ed. 177; *Andrews vs. Drake,* 6 Cir., 83 F. 2d 767; *Lewis Teese et al. vs. Huntingdon et al.,* 23 How. 2, 14, 16 L. Ed. 479; *Ferguson Contracting Company vs. Manhattan Trust Company,* 6 Cir., 118 F. 791; *Hitchcock vs. American Plate Glass Co.,* 3 Cir., 259 F. 948; *General Electric Company vs. Continental Lamp Works,* 2 Cir., 280 F. 846."

Andrews vs. Drake, 83 Fed. (2) 767, 770 (cert. denied 299 U. S. 572), the court stated: "That decrees are based upon issues and that proof as to all other matters is irrelevant." The enforcement of rights and obligations in judicial proceedings depends on issues disclosed by pleadings

supported by evidence and a decree may not be based on mere conjecture, supposition or speculation. *Drybough vs. Ware*, 111 Fed. 2d 548, 551.

U. S. vs. The Seminole Nation, 299 U. S. 417 at 422, this court said:

> "The judgment may not be sustained as to any item that is not included in a cause of action set up in the original petition or that was by the findings of the lower court or otherwise put upon a ground not there alleged. *Harrison vs. Nixon*, 9 Pet. 483, 503. *Boone vs. Chiles*, 10 Pet. 177, 209. *Garland vs. Davis*, 4 How. 131, 148. It may not be upheld as to any item that is not supported by definite findings of fact extending to all essential issues and which, unaided by statements in the court's conclusions of law or its opinion, are clearly sufficient to entitle plaintiff to recover. *United States vs. Esnault-Pelterie*, 299 U. S. 201, 205."

American Propeller & Mfg. Co. vs. U. S., 300 U. S. 475, at 479 the court said:

> "But we are dealing here not with a presumption, but with a specific finding; and that finding should be examined in the light of the pleadings."

Garrett, Admr., vs. L. & N. R. R. Co., 235 U. S. 308, at 312 this court said:

> "Where any fact is necessary to be proved in order to sustain the plaintiff's right of recovery the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point so that the parties may come prepared with their evidence and not be taken by surprise and the jury may not be misled by the introduction of various matters. *Bank of the United States vs. Smith*, 11 Wheat. 171, 174; *Minor vs. Mechanics' Bank*, 1 Pet. 46, 67; *DeLuca vs. Hughes*, 96 Fed. Rep. 923, 925; *Rose vs. Perry*, 8 Yerg. 156; *Citizens' St. R. R. vs. Burke*, 98 Tennessee 650; 1 Chitty on Pleading 270. Although the same precision of statement is not required as in pleadings at law, nevertheless it is held to be abso-

lutely necessary that in bills of equity such a convenient degree of certainty should be adopted as may serve to give the defendant full information of the case which he is called upon to answer. Every bill must contain in itself sufficient matters of fact, *per se*, to maintain the plaintiff's case; and if the proofs go to matters not set up therein, the court cannot judicially act upon them as a ground for decision, for the pleadings do not put them in contestation. *Harrison vs. Nixon*, 9 Pet. 483, 503; Daniell's Ch. Pl. & Pr. 368."

The lower court disregarded this variance of proof from the pleadings and although the evidence disclosed no restraint of trade in forming machines the court refused to so find and based its judgment upon mere conjecture, supposition and speculation.

It is no answer to this contention that these appellants were aware of the general charge of conspiracy and that the variance of the proof beyond the scope of the pleadings was not prejudicial. These appellants had the right to rely upon the issues as made up by the pleadings, and the failure of the plaintiff to establish the charges as alleged against these appellants warranted complete reliance upon their motion to dismiss and obviated the necessity of introducing testimony in defense of matters extraneous to the allegations in the complaint.

For the foregoing reasons we submit that the trial court should have sustained the motion of Lynch made at the conclusion of the plaintiff's case.

II

FAILURE TO COMPLY WITH RULE 52 OF THE FEDERAL RULES OF CIVIL PROCEDURE

The court erred in rejecting all of the findings of fact and conclusions of law submitted by these appellants at the court's request and in entering verbatim biased and prejudicial findings and conclusions relating to these appellants submitted by the plaintiff.

At the conclusion of the final argument the court requested counsel for plaintiff and defendants to submit proposed findings of fact and conclusions of law.[1] Counsel for these appellants prepared and filed with the court proposed findings with appropriate reference to the record in support thereof.[2] The trial court ignored the findings and conclusions submitted on behalf of these appellants and upon the day following the filing of his opinion mechanically entered verbatim the findings and conclusions proposed by counsel for appellee relating to these appellants.[3]

Rule 52 of the Rules of Civil Procedure requires the trial court to find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. Although it may be the usual practice for counsel for opposing litigants to assist the court by submitting proposed findings, the spirit of the rule, if not the letter, contemplates that such findings and conclusions as may be entered shall be those of the court himself and that the court shall not mechanically enter such findings as may be prepared and submitted by the prevailing party. That the court shall make his own findings is clearly indicated by the provisions of Rule 52 that the findings shall

[1] R. 6854-5.
[2] R. 7212-28.
[3] R. 6996-7003.

not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the court to judge of the credibility of witnesses.

The purpose of the rule is not only to apprise the appellate court of the facts as specially found by the trial judge but of even more importance the purpose is to insure as fair a trial for the parties as humanly possible, and this result can only be obtained by the trial judge assuming the duty himself of finding the ultimate facts.

Rule 52 was patterned after former Equity Rule 70½ adopted in November, 1935. Under Equity Rule 70½ the findings of fact were required to be of ultimate facts as distinguished from evidentiary facts: *Oil Shares, Inc., vs. Kahn,* 94 Fed. (2d) 751; and as distinguished also from legal conclusions, a legal conclusion being insufficient to support the decree. *Interstate Circuit vs. U. S.,* 304 U. S. 55.

Arduous as the task may be in the case of a protracted trial such as was had in the instant case, nevertheless in such a case it is even more important that the court make and enter its own findings and conclusions. Compliance with the rule is of particular importance in anti-trust cases. *Interstate Circuit vs. U. S.,* 304 U. S. 55, 57. These appellants were not only denied their day in court but in order for the Supreme Court to properly pass upon the errors asserted, the additional burden is imposed upon this court to review the record in order to determine whether the final judgment is supported by appropriate findings and then to determine whether such findings are supported by the evidence.

An examination of the findings in this case indicates:

1. That all of them are substantially the same as those prepared and submitted by the appellee, and those relating to these appellants are entered word for word as prepared by the appellee.

2. That the findings do not conform to either the letter or spirit of the rule, especially in this type of case,

(a) Because they are not brief and pertinent findings of contested matters;

(b) Because the findings in such number are unreasonable and unfair to the appellants and an imposition upon this court;

(c) Because the findings place an unreasonable burden upon the appellants in overcoming the rule that findings should not be set aside unless clearly erroneous.

(d) Because most of the findings relating to appellants are not of ultimate facts but are either legal conclusions or irrelevant.

3. The findings were not confined to the issues in the case relating to these appellants.

4. The findings are not of real aid in an anti-trust case unless made by the trial judge personally while the evidence is fresh in his mind.

5. The findings are inconsistent and conflicting.

The Court of Appeals of the Second Circuit has on several occasions criticized the practice of trial courts in entering findings proposed by prevailing counsel and have insisted that in matters of such importance the trial judge should formulate his own findings. We call attention to the fact that in this case this court is now confronted with 628 special findings of fact and 89 conclusions of law and that there are over 30 findings of fact intended to be applicable to Lynch Corporation.

Illustrative of the result of the adoption of findings such as occurred in this case, we point out that there are a number of conflicts between the court's opinion, the Bill of Complaint, the findings, and the judgment.

The question was treated by the Court of Appeals of the Second Circuit in *Matton Oil Transfer Corp. vs. The Dynamic, et al.*, 123 Fed. Rep. (2) 999, and again in *U. S.*

vs. Furness, et al., 125 Fed. Rep. (2) 928, at 942 where the court says:

> "We have recently asked for 'brief and pertinent findings of contested matters * * * rather than the delayed, argumentative, overdetailed documents prepared by winning counsel.' *Matton Oil Transfer Corp. vs. Tug Dynamic*, 2 Cir., Dec. 1, 1941, 123 F. 2d 999, 1001. Otherwise, we lose the benefit of the judge's own consideration. In the instant case, a comparison of the findings with the opinion seems to show that the findings proposed by the defendants were mechanically adopted, with the consequence that some of the findings made by the district court are not supported by the evidence and not substantially in accord with the opinion. Such a result can usually be avoided by following what we believe is the better practice of filing findings with the opinion, when the evidence is still fresh in the mind of the trial judge, and permitting the parties to file objections under Federal Rules of Civil Procedure, rule 52 (b). See *Matton Oil Transfer Corp. vs. Tug 'Dynamic' supra.*
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> "We stress this matter because of the grave importance of fact-finding. The correct finding, as near as may be, of the facts of a law suit, is fully as important as the application of the correct legal rules to the facts as found. An impeccably 'right' legal rule applied to the 'wrong' facts yields a decision which is as faulty as one which results from the application of the 'wrong' legal rule to the 'right' facts. The latter type of error, indeed, can be corrected on appeal. But the former is not subject to such correction unless the appellant overcomes the heavy burden of showing that the findings of fact are 'clearly erroneous.' Chief Justice Hughes once remarked, 'An unscrupulous administrator might be tempted to say "Let me find the facts for the people of my country, and I care little who lays down the general principles."' That comment should be extended to include facts found without due care as well as unscrupulous fact-finding; for such lack of due care is less likely to reveal itself than lack of scruples, which, we trust, seldom exists. And Chief

Justice Hughes' comment is just as applicable to the careless fact-finding of a judge as to that of an administrative officer. The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standard.

"It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper. The trial court is the most important agency of the judicial branch of the government precisely because on it rests the responsibility of ascertaining the facts. When a federal trial judge sits without a jury, that responsibility is his. And it is not a light responsibility since, unless his findings are 'clearly erroneous,' no upper court may disturb them. To ascertain the facts is not a mechanical act. It is a difficult art, not a science. It involves skill and judgment. As fact-finding is a human undertaking, it can, of course, never be perfect and infallible. For that very reason every effort should be made to render it as adequate as it humanly can be."

In *Epstein vs. Goldstein, et al.*, 107 F. (2d) 755, the Court says at page 758:

"We cannot conclude this opinion without uttering a serious protest and criticism concerning the form of the findings of fact and conclusions of law as they appear in this record. After the opinion was handed down, the plaintiff and each defendant filed proposed findings and the judge marked 'found' or 'not found' against each proposed item of each of the documents. As a result there are three sets of findings of fact and conclusions of law, differing in phraseology, filled with repetitions and covering

> nearly 60 printed pages. Such a practice places an intolerable burden upon an appellate court. Instead of simplifying the task of ascertaining the facts and rules of law which the trial judge found and applied, it merely confuses them; it defeats the very purpose of Equity Rule 70½, 28 U. S. C. A. following Section 723. It is the duty of the trial judge to make his findings without unnecessary repetition and to condense the various proposed findings into a single document; and it is the duty of the attorney who prepare the record to see that this is done."

These appellants called this criticism to the trial court's attention by incorporating it in a motion for a new trial which was overruled by the trial court without comment.[4]

It is, therefore, submitted that not only the manner of entering the findings but also the number and character of the findings are violative of Rule 52 and burdensome to such an extent both to appellants and this court as justifies a summary dismissal of the appellants particularly inasmuch as any and all issues with respect to these appellants have become moot.

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[4]R. 7696-99.

III

THE CROSS-LICENSING AGREEMENT OF AUGUST 23, 1933, WAS LEGAL AND PROPER AND THE EVIDENCE SHOWS THAT THERE WAS NO ILLEGAL RESTRAINT OF TRADE

As heretofore indicated the Bill of Complaint charged that the purpose and effect of the Hartford-Lynch cross-licensing agreement of August 23, 1933, was to compel a purchaser of a Lynch forming machine to use a Hartford feeder. Lynch was not charged with conspiring to violate the Clayton Act. With respect to the cross-licensing agreements of 1933 the court found that Lynch had not theretofore engaged in the manufacture of suction machines or feeders but that the purpose of the Lynch suction license to Owens and of the feeder license to Hartford was to prevent Lynch from making suction machines and feeders and to furnish Lynch with part of the cash necessary to purchase the Miller business.[1]

In entering the findings submitted by the Government the trial court ignored the matters hereinbefore set forth and found that on September 20, 1933, Hartford instructed Lynch to refuse to furnish machines to customers who were not feeder licensees of Hartford[2] but there is neither findings nor evidence that Lynch agreed to such instructions. The evidence affirmatively shows that the reason why Lynch did not sell to persons who did not elect to secure a forming machine license from Hartford was to avoid damages for infringement for itself as well as its customers.[3]

The trial court also found at the request of the plaintiff that the purposes and effects of the Forming Machine Agreement was

(1) to cause non-feeder licensees of Hartford to

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[1]Findings 330-33, R. 7347-8.
[2]Finding 336, R. 7349.
[3]R. 2879, 2890.

accept a feeder license and thereby to bolster (*sic*) Hartford's monopoly of feeders,[4] and

(2) to give Hartford complete control over the distribution and use of all narrow-neck forming machines and of substantially all wide-mouth forming machines.[5]

It is apparent that the court below was confused throughout the trial as to responsibility as between Lynch and Hartford as to various acts as well as to the purpose and intent respectively of the two companies.

It is the position of these appellants that such findings were beyond the scope of the issues in the case and that whatever control over the marketing of forming machines may have been exercised by Hartford arose, not out of its contract with Lynch, but by reason of Hartford's ownership of the Headley-Thompson and other patents which the evidence discloses covered the Lynch machines.

Prior to, as well as subsequent to, 1933 Hartford had been Lynch's chief competitor in forming machines. Lynch had never engaged in or cared to make feeders or suction machines. Hartford owned clearly established and basic patents on feeders so that Lynch could not have made them without securing rights to do so under Hartford patents. Notwithstanding that all of Owens' basic patents on suction machines had expired, Owens was the only glassware manufacturer using suction machines, and therefore there was no market for Lynch to serve in that field. However, Lynch engineers were constantly engaged in endeavoring to improve Lynch machines which were used with Hartford as well as other feeders, and incident to such work it was entirely possible that Lynch might discover some idea of considerable value to Hartford. Although the suction process was a different method of producing glass, it was nevertheless possible that Lynch might discover some valuable suction idea. These possible suction and feeder rights had

[4]R. 7349.
[5]R. 7350.

speculative and an undetermined value for which the parties decided were worth $250,000. Adequate consideration can legally be demanded for such grants. *Standard Oil Co. vs. U. S.*, 283 U. S. 163, 170.

Regardless of the reasons underlying the granting of the patent rights and the payment of the money, there was no evidence showing that Lynch and Hartford were competitors in feeders or that Lynch and Owens were competitors in the distribution of suction machines, and the finding that the purpose was to prevent Lynch from making feeders and suction machines is wholly beyond the scope of the pleadings because these feeder and suction license agreements are not even mentioned in the Bill of Complaint. The finding is likewise wholly unwarranted to support a conclusion of the violation of the anti-trust law because there was no pre-existing competition between Hartford, Owens and Lynch with respect to feeders and suction machines. "If there be no pre-existing substantial competition to be effected, the forbidden result is not produced." *International Shoe Co. vs. Com.*, 280 U. S. 291, 298; *Fed. Trade Com. vs. Raladam Co.*, 283 U. S. 643, 648.

The court also found that the non-exclusive cross-licensing forming machine agreement between Hartford and Lynch

(a) constituted through Section 8 thereof a substantial restraint upon Hartford's ability to compete with Lynch in the distribution of forming machines.[6] This finding is likewise beyond the issues made by the pleadings and any claim with respect to Section 8 of the cross-licensing agreement has become moot and is commented upon at pp. 87-94. In addition this provision in the agreement was well within the reward of the Lynch patents. See *U. S. vs. General Electric*, 272 U. S. 476, 489.

(b) The court also found that the agreement placed Obear-Nestor Glass Company and Reed Glass Company at

[6]Finding 335, R. 7349.

a competitive disadvantage because they were unable to acquire Lynch forming machines without securing a license from Hartford.[7] The evidence disclosed that Reed and Obear-Nestor complained that they were unable to purchase the more efficient modern Lynch 10 machines without obtaining a license to use such machines from Hartford. But the evidence shows that they could have obtained such machines upon the same terms and conditions as other licensees of Hartford; that Lynch's refusal to sell them machines was because the machines were covered by Hartford patents and Lynch could not sell them such machines without subjecting itself as well as Reed and Obear-Nestor to damages for infringement;[8] that Reed and Obear-Nestor not only continued in business in competition with the rest of the industry but maintained their relative standing in the industry in the production of glassware.[9]

(c) The court also found that from August 23, 1933, until September 18, 1940, Lynch sold no narrow-neck machines to any manufacturer who was not a feeder licensee of Hartford, and from August 23, 1933, until November 12, 1938, sold no wide-mouth machines to any manufacturer who was not a feeder licensee of Hartford.[10] The above findings are supported by the evidence but they are clearly misleading because they fail to indicate that during the periods in question Lynch did not sell its machines to persons who did not elect to secure a forming machine license from Hartford. They also fail to indicate that the reason why Lynch refrained from selling to others was because Lynch as well as such other purchasers would have been subjected to damages for infringement of Hartford patents. From such finding and other findings relating to the Forming Machine Agreement the conclusion that Lynch violated

[7]Finding 337, R. 7349.
[8]R. 2879.
[9]Exhibits 9CA6087-8, R. 16247-8.
[10]Finding 338, R. 7349.

the anti-trust laws by unduly restraining trade in forming machines is purely speculative.

(d) The court also found that one of the purposes and effects of the Forming Machine Agreement was to cause non-feeder licensees of Hartford to accept such a feeder license and thereby to bolster Hartford's monopoly of feeders.[11] This finding fails to distinguish between purpose and effect as illustrated by the *Apex Hosiery* case. The evidence discloses that the purpose of Lynch in entering into the cross-licensing Forming Machine Agreement was to settle expensive litigation in which it faced ultimate defeat, a procedure definitely approved by the Supreme Court. *Standard Oil Co. vs. U. S.*, 283 U. S. 163. There is no evidence that officers of Lynch Corporation had any knowledge that either the purpose or the effect of the agreement would require a non-feeder licensee of Hartford to take such a license or bolster Hartford's alleged monopoly of feeders. We again call attention to the fact that no such issue was raised by the pleadings. Suppose that all that is claimed against Hartford is true, still Lynch had a right to protect its business by entering into a cross-licensing agreement. *Virtue vs. Creamery Co.*, 227 U. S. 8, 33, *supra.*

(e) The court also found that the agreement had the purpose and effect of giving Hartford complete control over the distribution and use of all narrow-neck and of substantially all wide-mouth forming machines and prevented new capital and new concerns from entering the glassware business.[12] This finding is certainly inconsistent with the court's finding No. 335 that Section 8 was a substantial restraint upon Hartford's ability to compete with Lynch in forming machines, and is further evidence of the Court's confusion. The cross-licensing agreement itself gave Hartford no control over the distribution of and use of forming

[11]Finding 339, R. 7349.
[12]Findings 341, 342, R. 7350.

machines. It is obvious that whatever control Hartford exercised over the distribution and use of forming machines arose over Hartford's acquisition of the Headley and Thompson and other Hartford patents and the cross-licensing agreement clearly resulted in a relaxation of the right which Hartford already had to restrain the manufacture and use of forming machines embodying Hartford inventions by permitting Lynch to continue to manufacture and sell its forming machines which embodied Hartford inventions in competition with Hartford's machines. The lower court ignored the fact that Hartford and Lynch interchanged non-exclusive rights to use their respective inventions and the legal effect of the agreement was that each gave the other "mere covenants not to sue" under their respective patents, *General Pictures Co. vs. Electric Co.*, 304 U. S. 175, 181. We repeat that no act of Lynch increased an iota the control which Hartford already possessed. Nothing in the agreement prevented Lynch from building or selling to whomsoever it pleased machines embodying Hartford inventions; but had it sold to any customer who did not have a forming machine license from Hartford, Lynch as well as the users of such machines would have been subject to damages for infringement. This, Lynch naturally did not desire to incur.[13] The evidence fails to disclose a single instance of a manufacturer going out of business because of lack of machines. The three so-called "independent" manufacturers who refused to accept a forming machine license from Hartford—Obear-Nestor, Reed and Kerr—have remained in business in competition with the remainder of the industry. The only evidence with respect to Kerr is that it made wide-mouth ware upon machines which Hartford did not regard as infringing Hartford's patents.[14] The evidence fails to disclose that either prior to or subsequent to 1938 did Kerr desire to purchase

[13]R. 2879.
[14]R. 6108-9.

Lynch machines. Throughout the entire voluminous record there is no evidence to show that trade in forming machines was actually restrained.

The question of interference with prices is not involved in this case insofar as Lynch is concerned and there is no evidence that Lynch Corporation joined any unlawful patent pool.

The trial court, among other things, was clearly confused, first as to the weight and admissibility against Lynch of memos of others dated years before Lynch was charged with joining the alleged conspiracy, none of which were ever brought to the attention of Lynch officials. The suggestion of Hartford to Lynch contained in a letter written February 9th, 1931, two years before Lynch is alleged to have conspired, that a conference between Hartford and Lynch might favor the continuance of friendly relations and more fully protect both from outside competition was referred to by the court during argument as a possible warning to Lynch that an unlawful conspiracy was on foot.[15] The uncontradicted evidence shows that following the receipt of this letter Lynch unsuccessfully sought to settle the patent controversy with Whitall-Tatum[16] and no conference with Hartford occurred until May, 1932, at which the matter of joint development of a better machine was discussed by representatives of Hartford and Lynch[17] without reaching any agreement or understanding.[18]

In the second place, the court was confused as to the issues involving Lynch as indicated by the opinion, findings and judgment. Compare opinion, pages 13 and 71, with Special Finding No. 338, R. 7349. Third, in restraining Lynch in connection with matters with which it never had any connection as indicated by the judgment; fourth, as to

[15] R. 6810-18.
[16] R. 2710-11.
[17] R. 2715.
[18] R. 2718.

the responsibility of Lynch for certain expressions of purpose and intent found in exhibits prepared by Hartford and other defendants (other than Lynch) which the court repeatedly in his opinion referred to as applying to all defendants and overlooked the fact that none of these expressions were ever brought to the attention of or were concurred in by Lynch officials.

Another unusual feature of this case is found in that provision of the judgment indicated as sub-paragraph (c) in paragraph 24[19] in which appears a definite differentiation in favor of Lynch for the reason that all other defendants are required to furnish drawings and patterns to any licensee. The court in its opinion said, p. 159:

> "The defendants will be enjoined from engaging in interstate commerce unless they (a) comply with the orders of the court, (b) agree to license anyone, royalty free, on all present patents and pending applications for patents for the life of the patents, and (c) make available to anyone who desires them copies of drawings and patterns relating to suction devices, feeders, forming machines (except Lynch) and lehrs."

The following comments on the opinion below indicate quite clearly that Lynch was punished because caught in supposedly bad company. The court, following the rule relating to the ascertainment of intent as suggested in *Standard Oil Co. vs. U. S.*, 221 U. S. 1, 75, called attention to various letters and documents from which he found that the motive of the defendants was not primarily to settle interferences but rather to create and maintain a monopoly of patents on glass making machinery in order that Hartford should have complete control of the gob feed process and Owens should have complete control of the suction process. It is significant that none of these documents to which the Court refers were prepared by or communicated to Lynch. However the Court obviously construed the

[19] R. 7668.

Lynch contract in the light of these documents.

The court, following the suggestion relative to the ascertainment of conscious guilt laid down by the court in *U. S. vs. American Tobacco Company,* 221 U. S. 106, 181-182, again called attention to various letters and documents from which he found a definite apprehension upon the part of the defendants of a violation of the anti-trust laws coupled with an attempt to surround many transactions with secretiveness in order to make ultimate discovery difficult. None of these were Lynch letters or documents.

The court, thereupon, concluded that the primary purpose of Hartford was to obtain dominance over the glass industry and that it was the primary purpose of obtaining monopolies and stabilizing the market which prompted the other defendants to join with Hartford.

It is significant that in developing the intent and conscious guilt of the defendants which constituted the major portion of the opinion, the court referred to no letter or document from Lynch introduced by the plaintiff relating to either subject, no letter or document introduced by the plaintiff and directed to Lynch for which Lynch can be held responsible and nothing to indicate that Lynch had any knowledge even of any of the letters and documents introduced by the plaintiff in support of either subject of inquiry, all of which points to the conclusion as above stated.

The severe condemnation of the major defendants and the statement (p. 51) that inferences are unnecessary bears out the conclusion above stated.

In addition, we call attention to the opinion (page 152):

> "In conclusion, it may be said that Hartford, with the cooperation, first, of Corning and Empire and, later, of Owens, Hazel-Atlas, Thatcher, Ball Brothers and Lynch, pursued a plan whereby through threats of litigation backed by the financial power that it controlled, through litigation expensive beyond the dreams of the average man, through the acquisition of the patents and businesses of competing devices

and firms at a great outlay of money, has corralled within its possession and control an aggregation of all the patents that pertain to the gob feed process in the manufacture of glass—one of the two automatic processes whereby glass containers may be made. This aggregation of patents for these machines has been strengthened through the acquisition of patents covering other devices necessary in the manufacture of glassware to the extent that all patents covering these other devices, such as forming machines and lehrs, have been acquired or are controlled by Hartford."

In the absence of any evidence whatever to support any part of the above quotation insofar as Lynch is concerned, coupled with the fact that Lynch was not mentioned as one of the favored licensees at page 105 of the court's opinion, we submit that what the court said is tantamount to holding that Lynch should be punished because of its business associates, otherwise the court surely would have found something among the innumerable letters and documents introduced by the plaintiff to indicate the contrary.

The court did not find nor did the evidence disclose that Hartford, Owens and Lynch combined to acquire the patent rights of their remaining competitors as alleged in the Bill of Complaint. "It is a familiar and elemental rule that pleadings and proof must reasonably correspond. *Standard Oil Co. vs. Brown,* 218 U. S. 78, 87." *Twachtman vs. Connelly,* 106 F. 2d 501, 506. Issues not raised by the pleadings cannot be determined, and a decree insofar as it undertakes to decide issues not made up by the pleadings is void, *Osage Oil Co. vs. Continental Oil Co.,* 34 Fed. 2d 585.

The enforcement of rights and obligations in judicial proceedings depends upon issues disclosed by pleadings supported by evidence and a decree may not be based on mere conjecture, supposition or speculation. *Drybough vs. Ware,* 111 F. 2d 548, 551 (6th Circ.).

It must be clear that there was no illegal restraint of trade proved as to Lynch Corporation.

IV

THE COURT ERRED IN ADJUDGING THAT THESE APPELLANTS JOINED THE CONSPIRACY ALLEGED IN THE BILL OF COMPLAINT

This error has been previously discussed on pp. 29-40 hereof.

V

THE COURT ERRED IN CONSIDERING EVIDENCE BEYOND THE SCOPE OF THE ISSUES MADE BY THE PLEADINGS RELATING TO THESE APPELLANTS

This title has been previously discussed on pp. 31-35 and 53-59.

VI

THE COURT ERRED IN CONCLUDING THAT THE PURCHASE BY LYNCH OF THE ASSETS OF ED MILLER WAS ILLEGAL

With respect to the Miller transaction the Bill of Complaint charged that Owens, Hartford and Lynch combined to acquire patent rights of their remaining competitors and that Lynch with funds supplied by Owens and Hartford purchased patent rights of their remaining competitors, O'Neill and Ed Miller, and transferred certain patents to Hartford and certain patents to Owens.[1] There is no finding upon this issue but instead the court found that Lynch with the financial assistance of Hartford, Owens, Levis and Collin acquired substantially all of the assets of Ed Miller and that Lynch raised the prices of Miller machines.[2] The court also erroneously found that Lynch and Ed Miller were in competition in the manufacture of forming machines.[3] These findings were not only beyond the scope of the issue with respect to the Miller transaction but the court's conclusion that the purchase was illegal was not supported by appropriate findings or by the evidence. It is the position of the government and apparently the trial court that because a small amount of wide-mouth ware is made upon narrow-neck machines Miller as a manufacturer of wide-mouth machines was in competition with Lynch as a manufacturer of narrow-neck machines. This conclusion is contrary to the decision of the Supreme Court in *International Shoe Company vs. Comm.*, 280 U. S. 291, 298, wherein the court said: "Obviously, such acquisition will not produce the forbidden result if there be no pre-existing

[1] R. 36.
[2] Findings 328, 329, R. 7347.
[3] Finding 322, R. 7346.

substantial competition to be effected; for the public interest is not concerned with the lessening of competition, which to begin with, is itself without real substance."

With respect to Lynch raising prices of Miller machines there was no such issue in the case and the evidence discloses that Lynch raised such prices without agreement with anyone after making a cost study of the Miller business.[4]

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[4]R. 2844.

VII

THE COURT ERRED IN ENJOINING THESE APPELLANTS FROM VIOLATING SECTION 3 OF THE CLAYTON ACT. (Assignments 1, 14, R. 7849, 7859.)

The complaint charged that the purpose and effect of the Hartford-Lynch cross-licensing agreement was to require the purchaser of a Lynch forming machine to use it with a Hartford feeder.[1] As we understand the clear import of Section 3 of the Clayton Act, Lynch Corporation may not lease or sell a forming machine on the condition, agreement or understanding that the lessee or purchaser shall not use or deal in the goods, wares and merchandise, machinery, etc., of a competitor of Lynch Corporation. With respect to his conclusion that Lynch violated the Clayton Act the reasoning of the court in its opinion is somewhat obscure.[2] The opinion states:

> "Assuming that manufacturing Company A, using its own feeders or the feeders of some independent manufacturer, desired to purchase a Lynch forming machine, and this appeared to be the only concern that a manufacturer could turn to for the purpose of purchasing a forming machine; then Company A would have to contract with Hartford for a feeder to operate with the forming machine. When it accepted a forming machine license from Hartford covering the Lynch forming machines, it had to use a Hartford feeder, or pay excessive royalties on the forming machine. This constituted the lease of a feeder machine on the condition that the lessee shall not use the feeders of a competitor of the lessor. Lynch, as a party to this agreement was equally in violation of Section 3 of the Clayton Act."

It will be at once apparent that the conclusion that the lease of a feeder on condition that the lessee should not use

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[1] R. 36.
[2] Opinion 72.

competitive feeders is based upon a mere assumption which neither the evidence nor the findings support because it is uncontradicted that manufacturer A might purchase a forming machine from either Lynch or Hartford. The Act forbids a lease or sale upon the prescribed condition. There is neither evidence nor any finding that Hartford ever leased a feeder upon condition that it be not used with Lynch or other machines. There is neither evidence, any finding, nor any claim that Lynch ever sold a machine upon condition that it be not used with machines of a competitor of Lynch, or that a Lynch machine should be used with a Hartford feeder. The evidence shows that Lynch, respecting its license from Hartford, sold its machines to purchasers who obtained forming machine licenses from Hartford to use such machines.[3] The court found, as alleged in the complaint, that one of the purposes and effects of the Forming Machine Agreement was to cause manufacturers not having a Hartford feeder license to accept such a feeder license, but there is no finding or evidence of any specific instance where a Hartford feeder was leased, or a Lynch machine sold, upon condition that such machines should not be used with machines of competitors.

Even assuming *arguendo*, that the conclusion of the trial court be correct, there was no violation of the Clayton Act merely because Lynch was a party to the Forming Machine Agreement. The Act is directed against the lessor or seller and not against a lessee, or purchaser or licensee. Here again the court below was confused as to the responsibility of Lynch for actions with which it had nothing to do and no way of preventing. See *Ethyl Corp. vs. U. S.*, 309 U. S. 436, 456.

In Conclusion of Law 65[4] the court concluded that the Forming Machine Agreement violated Section 1 of the Sherman Act and Section 3 of the Clayton Act, because

[3] R. 2890.
[4] R. 7415.

(1) it involved the use of patents to control the machines after Lynch had parted title to them, and

(2) it involved, in practical effect, a tying clause which prevented lessees of Hartford feeders using them in conjunction with Lynch forming machines from acquiring any other feeder for use with such forming machines, and thus contemplated the leasing of feeders on the condition or understanding that the lessee should not use or deal in the feeders of competitors of the lessor, where the effect of such lease might be substantially to lessen competition in violation of Section 3 of the Clayton Act.

Conclusion of Law 66[5] recites that the Forming Machine Agreement violated Section 3 of the Clayton Act in that by compelling a purchaser of a forming machine from Lynch to use a Hartford feeder it substantially lessened competition and tended to create a monopoly in glass making machinery.

Both of the above conclusions ignore the fact that manufacturers used a number of feeders other than Hartford feeders[6] although most of such manufacturers used such feeders under licenses from Hartford permitting their use without reference to the type of forming machine employed with such feeders. We repeat there is neither evidence nor any finding that Hartford ever leased a feeder or that Lynch ever sold a forming machine upon any condition that such machines be not used with machines of competitors of Hartford or Lynch, or that such machines be used only with machines of Hartford or Lynch. The court's conclusions entered verbatim at the request of the government are, therefore, obviously erroneous and were entered without giving due consideration to the terms of Section 3 of the Clayton Act.

In the final judgment the court did not find that the

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[5]R. 7415.
[6]R. 2721-2.

defendants violated the Clayton Act but in paragraph 9 of said judgment[7] Hartford, Lynch and all other defendants are enjoined from violating the Clayton Act. In paragraph 26 of said judgment[8] Hartford, Lynch and all other defendants are enjoined, until after entry of a finding by the court, on petition of the defendants, that "the consequence of the conduct of the defendants in violation of the Sherman Anti-trust Act and the Clayton Act have been fully dissipated," from doing certain things therein enumerated.

Aside from the fact that both paragraphs of the judgment directly violate Rule 65(d) of the Rules of Civil Procedure, as we have heretofore shown, there was no finding or any evidence to warrant the relief therein sought to be granted.

The Supreme Court is bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of summons for contempt. *Swift & Co. vs. U. S.*, 196 U. S. 375, 396.

See *Curtis Publishing Co. vs. Federal Trade Com.*, 270 Fed Rep. 881, affirmed 260 U. S. 568, referring to the text of the Act the court says at page 905:

> "The words are so clear they require no construction, and to needlessly construe, in order to broaden the scope of the statute, whether done by the Trade Commission in administering, or by this court in supervising the administration of, the statute, would be for either or both such agencies to write into the statute what Congress has not expressly written. Not only has no ground been shown for contending that by necessary implication the statute covered other subjects than leases, sales, contracts for sales, or other persons than lessees and purchasers, but the Supreme Court had in *Motion Picture Patents Co. vs. Universal Film*, 243 U. S. 518, 37 Sup. Ct. 416, 61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959, quoted below, indicated its view that the clause

[7] R. 7660.
[8] R. 7669.

> in question was passed to meet a clearly defined controversy which concerned leases and sales."

No sale was ever made by Lynch Corporation upon any of the prohibited conditions, agreements or understandings and no claim or finding of such could be made in order to bring it within the confines of the Clayton Act. In *Steiner Sales Co. vs. Schwartz Co.*, 98 Fed. (2) 999 (cert. denied 305 U. S. 662), the court said at page 1007:

> "Section 3 of the Clayton Act does not impinge upon the lawful monopoly granted to a patentee, namely, the exclusive right to manufacture, use and vend the patented device. It does not prohibit him from inhibiting the manufacture, use or sale or restricting the manufacture, use or sale of the patented device by others."

Under Rule 52 it is the duty of the District Court to make special, formal findings of fact, and state separately its conclusions of law thereon, determining all the issues in the case and compliance with this rule is particularly important in an anti-trust suit. *Interstate Circuit, Inc., vs. U. S.*, 304 U. S. 55. The trial court did not find nor could he find under the evidence that Lynch Corporation ever sold any of its machines upon the condition that the purchaser should not use or deal in the goods, etc., of a competitor of Lynch Corporation.

VIII

THE COURT ERRED IN FAILING TO FIND THAT THERE EXISTED BETWEEN HARTFORD AND LYNCH LEGITIMATELY CONFLICTING PATENT INTERFERENCES, THAT THE INTERCHANGE OF PATENT RIGHTS BETWEEN SAID CORPORATIONS WAS NECESSARY IF TECHNICAL ADVANCEMENT OF GLASS-FORMING MACHINES WAS NOT TO BE BLOCKED BY CONTINUED LITIGATION, THAT THE CROSS-LICENSING AGREEMENTS FREED BOTH CORPORATIONS TO EMPLOY THEIR RESPECTIVE INVENTIONS IN FREE AND OPEN COMPETITION WITH EACH OTHER, AND THAT SUCH AGREEMENTS PROMOTED COMPETITION. (Assignments 2, 2½, 3, R. 7849-54.)

Counsel for these appellants requested the trial court to specifically find the matter set forth in the above heading[1] which the court ignored (we used the term "ignored" because no entry was filed rejecting such finding). Obviously the proposed finding was of substantial benefit to these appellants because such finding brought the issue with respect to the cross-licensing agreement squarely within legal bounds as prescribed by *Standard Oil Co. vs. U. S.*, 283 U. S. 163.

The trial court went so far as to say at pages 155-156 of his opinion:

> "It was for this reason that the court excluded all evidence introduced for the purpose of showing validity, prior art or infringement in connection with the Hartford patents."

[1] R. 7227.

Nevertheless the court did find:

> "The Headley & Thompson applications had an earlier filing date than that of Sears & Lobb (Exs. H-5509-5510), and contained broad claims relating to forming machines (Exs. 299, 300)."[2]

The court also found that the broad claims in the Headley and Thompson applications strongly influenced Hartford toward securing the Headley and Thompson option.[3]

The record unequivocally shows that Lynch could not in five years circumvent the Headley & Thompson application.

It cannot therefore be successfully contended that the Headley & Thompson patents did not dominate the forming machine field.

We have heretofore pointed out and there cannot be the slightest question but that Hartford and Lynch did have conflicting patent interferences and claims of infringement; that the cross-licensing agreement settled these claims and permitted both parties to employ their respective inventions in free and open competition, and that competition between Hartford and Lynch with respect to forming machines became more vigorous after the execution of the agreement. The evidence failed to disclose any actual restraint of trade in forming machines to the extent prohibited by the Sherman Act. Therefore, the failure of the court to make the above finding was prejudicial to these appellants.

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[2]Finding 286, R. 7339.
[3]Finding 296, R. 7341.

IX

THE COURT ERRED IN FAILING TO FIND AND CONCLUDE THAT THE ISSUES WITH RESPECT TO THESE APPELLANTS HAVE BECOME MOOT. (Assignments 3, 4, 5n, 38, R. 7853-4, 7857, 7865.)

Incident to the motion to dismiss made at the conclusion of plaintiff's case and during final argument, these appellants took the position that all issues with respect to them had become moot.

Section 8 of the forming machine agreement[1] provided that Hartford would pay Lynch $3000 for each forming machine that Hartford should deliver in excess of those having an aggregate production capacity greater than 40% of the production capacity of all forming machines delivered by both Hartford and Lynch. The court found that this provision constituted a substantial restraint upon Hartford's ability to compete with Lynch in the distribution of forming machines.[2]

Although the evidence discloses and the court found that Hartford was never required to pay any royalty to Lynch, the evidence further discloses that when Hartford had improved its I. S. machine to the point where it thought it might outsell Lynch machines in the manufacture of light ware and result in its having to pay some royalty to Lynch,[3] Lynch agreed to the cancellation of Section 8 in exchange for the right on the part of Lynch to sell wide-mouth machines without requiring purchasers to obtain a license from Hartford to use such machines.[4] Since November 12, 1938, Lynch has continued to offer and to sell and has sold wide-mouth machines without requiring the

[1]Exhibit 330, R. 9072-3.
[2]Finding 335, R. 7349.
[3]Ex. 1783, par. 5, R. 14294C.
[4]R. 2832, 2884, Finding 347, R. 7351.

purchaser thereof to secure a license to use such machines from Hartford.[5] It is, therefore, the position of these appellants that all issues with respect to Lynch's purchase of the Miller business and its sale of wide-mouth machines have become moot. Likewise any question with respect to said Section 8 has become moot.

Prior to the commencement of the trial of the case several pre-trial conferences were held with the court and the court urged the parties to endeavor to arrange a settlement.[6] Incident to one of these trial conferences counsel for the Government submitted a summary of practices,[7] in which the practices complained of against the several defendants and the relief demanded were summarized. In an effort to remove from the case the practices complained of against Lynch and Hartford and in response to the court's request that the case be settled Lynch and Hartford entered into a new cross-licensing agreement on September 18, 1940,[8] and cancelled their previous cross-licensing agreements of August 23, 1933. Under the 1940 agreement the parties exchanged non-exclusive rights to use their respective forming machine inventions and Lynch obtained the right to sell narrow-neck forming machines without requiring the purchasers thereof to secure forming machine licenses from Hartford. The evidence discloses that subsequent to September 18, 1940, Lynch Corporation has offered and has sold machines without requiring the purchasers thereof to secure a license from Hartford including sales to concerns which did not have feeder licenses from Hartford.[9]

Plaintiff took the position, however, that the November 12, 1938, amendment freeing wide-mouth machines was

[5]R. 2847.
[6]R. 573-4, 581-2, 601-2, 619-20, 623-4.
[7]Exhibit H-6113, R. 16256-71. Lynch Corporation, R. 16270.
[8]Exhibit H-5027, R. 9532-38.
[9]R. 2848.

engendered by Governmental compulsion and that the September 18, 1940, agreement having been executed subsequent to the filing of the Bill of Complaint would not render the issues with respect to Lynch Corporation moot.

The trial court agreed with the contention of the plaintiff and found that the November 12, 1938, amendment to the agreement was executed after the commencement of the investigation of the affairs of Hartford and Lynch by the Temporary National Economic Committee.[10]

The court also found that on September 18, 1940, after the filing of the complaint and answers in this case Hartford and Lynch cancelled the forming machine agreement and all amendments thereto and entered into a new agreement and also made the Hartford-Lynch feeder license nonexclusive.[11]

The court concluded as matters of law that abandonment of a practice or cancellation of a contract by the parties to a combination or conspiracy in violation of the antitrust laws, after the United States has challenged the legality of said practice or contract by filing a complaint against said parties, or otherwise, will not render the issue as to the legality of the challenged practice or contract moot in a suit by the United States on said complaint, where beneficial results of such practices or contracts continue to flow to the parties to the combination or conspiracy,[12] or where there is a reasonable likelihood that the contract or practice will be resumed in the absence of the issuance of an injunction restraining its resumption.[13]

It is the position of these appellants that the conclusions are not supported by the findings of the court or the evidence and are contrary to law.

The situation with reference to the cancelling of the

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[10]Finding 347, R. 7351.
[11]Finding 510, 511, R. 7378.
[12]Conclusion 44, R. 7411-12.
[13]Conclusion 45, R. 7411-12.

allegedly objectionable features of the forming machine agreement is much more favorable to Lynch than that resulting from the cancellation of certain cross-licensing contracts in *Standard Oil vs. U. S.*, 283 U. S. 163, wherein the court held that in a similar suit for an injunction under the Sherman Act questions raised as to the validity of agreements between defendants become moot when the agreements are cancelled by the defendants at the request of the trial court after trial but before entry of the decree.

From the opinion of the court below, *U. S. vs. Standard Oil Co.*, 33 Fed. 2d 617, at page 629, it appears that one of the covenants of the license agreement under attack violated the Sherman Act. The defendants asserted in oral argument that the covenant never had or would be enforced and was, therefore, of no significance. At the suggestion of the court the defendants cancelled the objectionable provision. To this action the government strenuously objected, insisting that defendants should not be permitted to avoid the effect of the litigation by an eleventh hour withdrawal from their previously asserted right to the covenant. The court said:

> "Were this the only provision objected to, we would view the litigation as happily ended. But there are other agreements which are attacked, and, if the attacks must be sustained, a decree for petitioner must necessarily follow."

When the case came before the Supreme Court, the court specifically held that in view of the cancellation of the objectionable clauses at the court's request prior to the entry of the decree the issues with respect thereto had become moot. The court stated, page 182:

> "As the relief here sought is an injunction, and hence relates only to the future, *United States vs. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 475, the alleged validity of such provisions has become moot. *Berry vs. Davis*, 242

U. S. 468; *Commercial Cable Co. vs. Burleson*, 250 U. S. 360; *Alejandrino vs. Quezon*, 271 U. S. 528; *United States vs. Anchor Coal Co.*, 279 U. S. 812."

In the instant case Section 8 of the contract which the court found to be in violation of the Sherman Act was cancelled in 1938 and the remainder of the contract was cancelled several months before the trial commenced. This cancellation was made in good faith in order to remove the alleged practices complained of by the government in its statement furnished at the suggestion of the court that the issues in the case be settled,—not as an "eleventh hour" proposition during argument, as in the *Standard Oil* case. The trial court was advised of the settlement prior to the trial,[14] as was also the plaintiff whose representatives made no objection. The only basis upon which an injunction can be granted against the execution of similar contracts in the future would be upon a finding that the cancellation of such agreements was made in bad faith and that there is a "dangerous probability" that such allegedly illegal agreements and practices might be conducted, executed or continued in the future. *U. S. vs. U. S. Steel Corp.*, 251 U. S. 417, 445. No such finding was made by the trial court nor is it warranted by the evidence. The good faith of Lynch Corporation in securing the release of all of its wide-mouth machines from license limitations in 1938 followed by actual sales of narrow-neck machines after September 18, 1940, is not open to question.

In the instant case there is neither evidence nor any finding that the September 18, 1940, Hartford-Lynch contract was not entered into by Lynch Corporation in good faith nor that Lynch will engage in any of the transactions complained against in the future.

In order to support the conclusions referred to above by the court and the injunction it is necessary for the court

[14] R. 623-4.

to find from the evidence that there is a "dangerous probability of the resumption by Lynch of the practices complained of"—the test for granting an injunction found in *Swift & Company vs. U. S.*, 196 U. S. 375, 396, cited *U. S. vs. U. S. Steel Corp.*, 251 U. S. 417, 445. Conclusion 45 is in direct conflict with these cases. Obviously, Lynch, under no circumstances, would surrender an unlimited license and accept a limited license. It never had liked the restriction.[15]

The function of any injunction is to afford preventive relief not to redress alleged wrongs which have been previously committed. *U. S. vs. U. S. Steel Corp.*, 251 U. S. 417, 445; *Industrial Ass'n vs. U. S.*, 268 U. S. 64, 84; *U. S. vs. U. S. Steel Corp.*, 223 Fed. 55; *U. S. vs. Pan American Commission*, 261 Fed. 229; *Cont. Securities Co. vs. I. R. T.*, 207 Fed. 467; *U. S. vs. DuPont Co.*, 188 Fed. 127.

It will be noted that neither of the above conclusions, 44 and 45, are in accordance with the above authorities and are, therefore, contrary to law.

The evidence disclosed that for some twenty-five years Lynch's primary object has been to improve, develop and promote the outright sale of as many forming machines as it could induce the industry to purchase. It has always sold its machines outright, dealing at arm's length with glass manufacturers on its own terms as to price, in competition with Hartford and others. Prior to 1933 Lynch had sold its machines under its own inventions without cross-licensing agreements with other patentees. In 1927, 70% of the forming machines in use were Lynch machines. This high rank was achieved exclusively upon the efficiency of the Lynch machines and without any serious patent difficulty or assertion of patent rights excluding others from the forming machine field.

But in 1927 Lynch became involved in what turned out to be a very serious patent controversy and in June, 1933,

[15]R. 2767, 2832, Exhibit 1042, R. 13691-2.

gave promise of a disastrous outcome which would make it impossible for Lynch to continue to market its machines. Having already spent $250,000 in litigation, Lynch entered into a cross-licensing agreement with the holder of the dominant Headley and Thompson patents upon the best obtainable terms it could secure, which permitted it to continue to make and market its machines on its own terms as to price and otherwise, except that the holder of the dominant patent would not under the agreement waive its right to sue Lynch in the event it should sell its machines to concerns who did not have a license to use them from the patentee. The evidence indicates that Lynch entered into the contract solely as a result of the patent controversy.

Following the execution of the cross-licensing agreements Lynch respected their terms by refraining from selling its machines to non-Hartford licensees not for the purpose of restraining trade but to avoid injunction and damages, both for itself as well as its customers. Serious and insistent efforts were initiated by Lynch to get Hartford to expand its covenant not to sue to include the sale of wide-mouth machines without requiring purchasers to obtain a license from Hartford. This Lynch finally secured in November, 1938, in exchange for the cancellation of the 40% royalty clause (Section 8).

Hartford, on the other hand, did not like Section 8. Lynch used Section 8 for trading purposes in its effort to free wide-mouth machines. Hartford had improved its I. S machine to the point where it thought it might outsell Lynch machines in the manufacture of light ware, which might result in its having to pay some royalty to Lynch. The 1938 agreement, therefore, was reached as a result of the trade of the royalty clause for freeing wide-mouth machines and was engendered by commercial considerations and not by governmental compulsion.

Conclusion 45 is obviously in conflict with *Swift & Co.*

vs. U. S., 196 U. S. 375, 396, and *U. S. vs. Steel Corp.*, 251 U. S. 417, 445. Conclusion 44 asserts a new principle of law relating to injunctions and is not supported by any previously reported case of which we are aware, but regardless of its soundness as a bare proposition of law, it is not based upon any evidence or finding that any beneficial results continue to flow to Lynch Corporation by reason of the challenged practices or contracts of Lynch Corporation.

Finally, in 1940 and before trial, as heretofore set forth, Lynch was able to free all of its remaining machines (narrow-neck) from the requirement of securing a license under Hartford's inventions. In other words, Lynch is now again in the same position it was originally, free to sell all the machines it could to whomsoever it pleased. Now, however, it and its customers are protected against any claims for infringement, whereas from 1927 to 1933 there was always the specter of damages for infringement. Whatever beneficial results continued to flow to Lynch Corporation are those incident to a free and unrestricted opportunity to market its machines in continued competition with Hartford. Lynch is now free to, and does conduct its business in the same manner as it did prior to the adverse patent decision of June, 1933. There never has been any complaint that such policies and methods were not entirely proper and legal. Surely there is now no basis or cause for injunctive relief.

X

THE COURT ERRED IN INCLUDING THESE APPELLANTS IN NUMEROUS SECTIONS OF THE FINAL JUDGMENT IN DISREGARD OF THE NATURE OF LYNCH'S BUSINESS IN CONTRAST TO THAT OF OTHER DEFENDANTS AND IN COMPLETE DISREGARD OF THE FAILURE OF THE EVIDENCE TO DISCLOSE THAT THESE APPELLANTS HAD EVER ENGAGED IN MANY OF THE PRACTICES ENUMERATED AND ENJOINED IN THE SEVERAL INJUNCTIVE PROVISIONS OF SAID JUDGMENT (Assignments 18, 22-23, 36, 37, 44, R. 7859, 7860, 7864-5, 7867) AND IN GRANTING RELIEF IN EXCESS OF THAT CONTEMPLATED BY THE SHERMAN ACT, THE CLAYTON ACT, BY LAW OR IN EQUITY (Assignments 34, 35, 37, 39-44, R. 7863-8).

Subsequent to the filing of the opinion and the entering of findings and conclusions, counsel for plaintiff below submitted to the court a proposed final judgment to which objections were filed by these appellants and others.[1] During the argument upon the settlement of the judgment counsel for plaintiff below made certain concessions and suggested certain modifications of the proposed judgment,[2] which judgment, as modified, was entered by the court. "A judge himself should draw the specific terms of such restraint and not rely on drafts submitted by the parties" *Wagon Drivers' Union vs. Meadowmoor Dairies,* 312 U. S. 287, 296. As in the case of the entry of findings and conclusions, the court entered the final judgment without giving due consideration

[1] R. 7422-7459.
[2] R. 6897-6914.

to the objections thereto submitted and argued by defendants which resulted in the inclusion of these appellants in the drastic injunctive provisions in disregard of the nature of the several defendants' businesses and without regard to whether the evidence and findings indicated that each of the defendants had previously engaged in practices enjoined.

Section 4, Title 15, U. S. Code, invests jurisdiction upon District Courts to prevent and restrain violations of the anti-trust laws but the court has no jurisdiction to enjoin future conduct of a defendant in the absence of evidence that such defendant had previously illegally engaged in such enjoined conduct. "The court was bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival" (*Ethyl Corp. vs. U. S.*, 309 U. S. 436), but there is no authority which permits the court to grant punitive and unnecessary relief, such as is provided in the instant final judgment. On the contrary it is the duty of the court to restrain present violations which presupposes previous illegal conduct.

Even in the case of the drastic Standard Oil dissolution decree, *Standard Oil vs. U. S.*, 221 U. S. 1, the Supreme Court did not hesitate to modify the decree and although it recognized that the remedy to be administered in case of a combination violating the Anti-trust Act is two-fold: First, to forbid the continuance of the prohibited act, and second, to so dissolve the combination as to neutralize the force of the unlawful power, it also held that penalties which are not authorized by law cannot be inflicted by judicial authority.

In the instant case the evidence discloses and it may be inferred from the findings that on November 12, 1938, Lynch secured the release of wide-mouth forming machines from Hartford license limitations and that on September

18, 1940, in its new license agreement with Hartford it secured the release of all of its forming machines from license limitations.

The evidence discloses that throughout its entire history Lynch was primarily interested in developing, improving and marketing just as many of its forming machines as it could induce the industry to purchase and only consented to enter into the cross-licensing forming machine agreement with Hartford after it had lost its patent interference case. Nevertheless and notwithstanding that no criticism has ever been levelled against the terms of its present agreement with Hartford the court in Section 27 of the judgment directs the cancellation of the September 18, 1940, contract and attempts to cancel the August 23, 1933, contracts although the evidence discloses that such contracts have previously been voluntarily cancelled by the parties.[3] The evidence disclosed no dangerous probability of the resumption of challenged contracts or practices by Lynch Corporation.

Although from a practical standpoint most of the injunctive provisions will not affect the future conduct of Lynch Corporation's business because it has never engaged in the practices so enjoined, nevertheless the drastic, sweeping and general provisions of these sections of the judgment place these appellants in possible jeopardy for contempt in pursuing ordinary innocent business practices.

In *Labor Board vs. Express Pub. Co.*, 312 U. S. 426, the Supreme Court said, p. 435:

> "A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past. But the mere fact that a court has found that a defendant has committed an act in violation of

[3] R. 7671, 7685.

a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. This court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus dissociated from those which a defendant has committed. *Swift & Co. vs. United States*, 196 U. S. 375; *New York, N. H. & H. R. Co. vs. Interstate Commerce Comm'n*, 200 U. S. 361, 404, and see under the National Labor Relations Act, *National Labor Relations Board vs. Swift & Co.*, 108 F. 2d 988."

On page 437 the court says:

"To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past. That justification is lacking here."

See also *Trade Commission vs. Beechnut Company*, 257 U. S. 441, pp. 455-456.

In the instant case the judgment not only enjoins these defendants generally from further violations of the anti-trust laws but specifically enjoins these appellants from engaging in normal business pursuits in the absence of any finding or evidence that these appellants ever engaged in the practices so enjoined.

The Supreme Court has adopted the practice of laying down the principles controlling the disposition of a case and the relief to be afforded, and remanding the case to the District Court with directions to determine upon and carry out a plan to accord relief by appropriate measures. *U. S. vs. St. Louis Terminal*, 236 U. S. 194, *U. S. vs. Union Pac. R. Co.*, 226 U. S. 61; *U. S. vs. St. Louis Terminal*, 224 U. S. 383; *U. S. vs. American Tobacco Co.*, 221 U. S. 106, *Standard Oil Co. vs. U. S.*, 221 U. S. 1.

In view of the errors committed by the court, it is respectfully submitted that the judgment should be reversed and the cause remanded with instructions to dismiss Lynch Corporation and its associated individual defendants.

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It is hereby certified that copies of the foregoing brief with record references except those contained in pages subsequent to 14346 (not then received from the printer) were delivered to counsel for the appellee on October 4, 1943, and identical copies of this brief on or about October 15, 1943.

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By FRANK S. LEWIS.